LIBRARY
SUPREME COURT U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 66

JAMES GOBER, ET AL., PETITIONERS,

vs.

CITY OF BIRMINGHAM.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALABAMA

PETITION FOR CERTIORARI FILED JANUARY 31, 1962
CERTIORARI GRANTED JUNE 25, 1962

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 66

JAMES GOBER, ET AL., PETITIONERS,

vs.

CITY OF BIRMINGHAM.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALABAMA

INDEX

	Original	Print
I		
Record from the Circuit Court of the Tenth Judicial Circuit of Alabama in and for Jefferson County in the case of The City of Birmingham v. James Gober, No. 20780	1	1
Appeal bond	1	1
Complaint	2	2
Motion to strike	2	3
Demurrers	3	4
Motion to exclude the evidence	5	6
Judgment entry	7	9
Motion for a new trial and order overruling	9	12
Appeal bond to Court of Appeals	12	15
Transcript of evidence	13	16
Appearances	13	17
Testimony of E. K. Martin—		
direct	15	18
cross	17	19

RECORD PRESS, PLINTERS, NEW YORK, N. Y., AUGUST 1, 1962

	Original	Print
Record from the Circuit Court of the Tenth Judicial Circuit of Alabama in and for Jefferson County in the case of The City of Birmingham v. James Gober, No. 20780—Continued		
Transcript of evidence—Continued		
Testimony of John I. Gottlinger—		
direct	18	21
cross	22	24
redirect	25	27
recross	25	27
C. L. Pierce—		
direct	26	28
Examination on voir dire	28	30
Testimony of James Edward Gober—		
direct	30	32
cross	31	34
C. L. Pierce— (recalled)—		
direct	36	37
cross	39	41
James Albert Davis—		
direct	41	43
cross	43	45
redirect	48	50
Transcript of sentencing	50	50
Reporter's certificate (omitted in printing)	53	55
Clerk's certificate	54	55
Proceedings in the Court of Appeals of the State of Alabama, Judicial Department, 6 Div. 797	55	56
Assignment of errors	55	56
Order of affirmance	57	57
Opinion, Harwood, J.	58	58
Application for rehearing and order overruling	66	65
Proceedings in the Supreme Court of Alabama, 6 Div. 762	67	66
Petition for certiorari	67	66
Order denying petition for writ of certiorari	72	69
Application for rehearing	73	70
Order overruling application for rehearing	74	71
Clerk's certificate (omitted in printing)	75	71

	Original	Print
Proceedings on petition for certiorari	75a	72
Clerk's certificate (omitted in printing)	76	72

II

Record from the Circuit Court of the Tenth Judicial Circuit of Alabama in and for Jefferson County in the case of The City of Birmingham v. James Albert Davis, No. 20779	1	73
Appeal bond (omitted in printing)	1	73
Complaint	2	73
Motion to strike	2	74
Demurrers	3	75
Motion to exclude the evidence	5	77
Judgment entry	8	81
Motion for a new trial and order overruling	10	83
Appeal bond to Court of Appeals (omitted in printing)	12	86
Transcript of evidence (omitted in printing)	14	86
Transcript of sentencing (omitted in printing)	51	86
Reporter's and clerk's certificates (omitted in printing)	56	86
Proceedings in the Court of Appeals of the State of Alabama, Judicial Department, 6 Div. 796	58	87
Assignment of errors	58	87
Order of affirmance	60	88
Application for rehearing and order overruling	61	89
Proceedings in the Supreme Court of Alabama, 6 Div. 761	61a	89
Proceedings on petition for certiorari (omitted in printing)	61a	89
Petition for certiorari	62	89
Order denying petition for writ of certiorari (omitted in printing)	67	92
Application for rehearing (omitted in printing)	68	92
Order overruling application for rehearing (omitted in printing)	69	92
Clerks' certificates (omitted in printing)	70	92

	Original	Print
III		
Record from the Circuit Court of the Tenth Judicial Circuit of Alabama in and for Jefferson County in the case of The City of Birmingham v. Roy Hutchinson, No. 20781	1	93
Appeal bond (omitted in printing)	1	93
Complaint	2	93
Motion to strike	2	94
Demurrers	3	95
Motion to exclude the evidence	5	97
Judgment entry	8	100
Motion for a new trial and order overruling	10	103
Appeal bond to Court of Appeals (omitted in printing)	12	105
Transcript of evidence	14	106
Appearances	14	106
Testimony of Elwood K. Martin—		
direct	16	107
cross	17	108
Carl A. Schmid—		
direct	19	109
cross	21	111
D. V. Kidd—		
direct	24	114
cross	27	117
redirect	31	120
recross	32	121
Transcript of sentencing (omitted in printing)	34	122
Reporter's and clerk's certificates (omitted in printing)	39	122
Proceedings in the Court of Appeals of the State of Alabama, Judicial Department, 6 Div. 798	41	123
Assignment of errors	41	123
Order of affirmance	42	124
Application for rehearing and order overruling (omitted in printing)	43	124
Proceedings in the Supreme Court of Alabama, 6 Div. 754	43a	124
Proceedings on petition for certiorari (omitted in printing)	43a	124

	Original	Print
Petition for certiorari	44	125
Order denying petition for writ of certiorari (omitted in printing)	47	128
Application for rehearing (omitted in printing)	48	128
Order overruling application for rehearing (omitted in printing)	49	128
Clerks' certificates (omitted in printing)	50	128
IV		
Record from the Circuit Court of the Tenth Judicial Circuit of Alabama in and for Jefferson County in the case of The City of Birmingham v. Robert J. King, No. 20783	1	129
Appeal bond (omitted in printing)	1	129
Complaint	2	129
Motion to strike	2	130
Demurrers	3	131
Motion to exclude the evidence	5	133
Judgment entry	8	136
Motion for a new trial and order overruling	10	139
Appeal bond to Court of Appeals (omitted in printing)	12	141
Transcript of evidence (omitted in printing)	14	142
Transcript of sentencing (omitted in printing)	34	142
Reporter's and clerk's certificates (omitted in printing)	39	142
Proceedings in the Court of Appeals of the State of Alabama, Judicial Department, 6 Div. 799	41	142
Assignment of errors	41	142
Order of affirmance	42	144
Application for rehearing and order overruling	43	144
Proceedings in the Supreme Court of Alabama, 6 Div. 757	43a	144
Proceedings on petition for certiorari (omitted in printing)	43a	144
Petition for certiorari (omitted in printing)	44	144
Order denying petition for writ of certiorari (omitted in printing)	48	144
Application for rehearing (omitted in printing)	49	144
Order overruling application for rehearing (omitted in printing)	50	144
Clerks' certificates (omitted in printing)	51	144

	Original	Print
V		
Record from the Circuit Court of the Tenth Judicial Circuit of Alabama in and for Jefferson County in the case of The City of Birmingham v. Robert L. Parker, Jr., No. 20784	1	145
Appeal bond (omitted in printing)	1	145
Complaint	2	145
Motion to strike	2	146
Demurrers	3	147
Motion to exclude the evidence	5	148
Judgment entry	8	152
Motion for a new trial and order overruling	10	154
Appeal bond to Court of Appeals (omitted in printing)	12	157
Transcript of evidence	14	157
Appearances	14	157
Testimony of B. R. Myers—		
direct	16	158
cross	17	159
Mrs. L. B. Gibbs—		
direct	20	162
cross	21	163
Lloyd L. Stallings—		
direct	22	164
cross	23	165
redirect	27	168
recross	27	169
William West—		
direct	28	170
cross	32	173
Transcript of sentencing (omitted in printing)	36	176
Reporter's and clerk's certificates (omitted in printing)	41	176
Proceedings in the Court of Appeals of the State of Alabama, Judicial Department, 6 Div. 800	43	177
Assignment of errors	43	177
Order of affirmance	45	178
Application for rehearing and order overruling (omitted in printing)	46	178

	Original	Print
Proceedings in the Supreme Court of Alabama, 6 Div. 756	46a	178
Proceedings on petitions for certiorari (omitted in printing)	46a	178
Petition for certiorari	47	179
Order denying petition for writ of certiorari (omitted in printing)	50	182
Application for rehearing (omitted in printing)	51	182
Order overruling application for rehearing (omitted in printing)	52	182
Clerks' certificates (omitted in printing)	53	182
VI		
Record from the Circuit Court of the Tenth Judicial Circuit of Alabama in and for Jefferson County in the case of The City of Birmingham v. William West, No. 20791	1	183
Appeal bond (omitted in printing)	1	183
Complaint	2	183
Motion to strike	2	184
Demurrers	3	185
Judgment entry	5	187
Motion for a new trial and order overruling	7	189
Appeal bond to Court of Appeals (omitted in printing)	9	192
Transcript of evidence (omitted in printing)	11	192
Transcript of sentencing (omitted in printing)	33	192
Reporter's and clerk's certificates (omitted in printing)	38	192
Proceedings in the Court of Appeals of the State of Alabama, Judicial Department, 6 Div. 804	40	192
Assignment of errors	40	192
Order of affirmance	41	194
Application for rehearing and order overruling (omitted in printing)	42	194
Proceedings in the Supreme Court of Alabama, 6 Div. 758	42a	194
Proceedings on petition for certiorari (omitted in printing)	42a	194
Petition for certiorari (omitted in printing)	43	194
Order denying petition for writ of certiorari (omitted in printing)	46	194

	Original	Print
Application for rehearing (omitted in printing)	47	194
Order overruling application for rehearing (omitted in printing)	48	194
Clerks' certificates (omitted in printing)	49	194

VII

Record from the Circuit Court of the Tenth Judicial Circuit of Alabama in and for Jefferson County in the case of The City of Birmingham v Robert D. Sanders, No. 20787	1	195
Appeal bond (omitted in printing)	1	195
Complaint	2	195
Motion to strike	2	196
Demurrers	3	197
Motion to exclude the evidence	5	199
Judgment entry	8	202
Motion for a new trial and order overruling	10	205
Appeal bond to Court of Appeals (omitted in printing)	12	207
Transcript of evidence	14	208
Appearances	14	208
Testimony of J. P. Caldwell—		
direct	16	208
cross	17	210
Albert J. Pearson—		
direct	18	210
cross	20	213
Transcript of sentencing (omitted in printing)	28	218
Reporter's and clerk's certificates (omitted in printing)	33	218
Proceedings in the Court of Appeals of the State of Alabama, Judicial Department, 6 Div. 801	35	219
Assignment of errors	35	219
Order of affirmance	36	220
Application for rehearing and order overruling (omitted in printing)	37	220
Proceedings in the Supreme Court of Alabama, 6 Div. 755	37a	220
Proceedings on petition for certiorari (omitted in printing)	37a	220

	Original	Print
Petition for certiorari	38	221
Order denying petition for writ of certiorari (omitted in printing)	42	224
Application for rehearing (omitted in printing)	43	224
Order overruling application for rehearing (omitted in printing)	44	224
Clerks' certificates (omitted in printing)	45	224
VIII		
Record from the Circuit Court of the Tenth Judicial Circuit of Alabama in and for Jefferson County in the case of The City of Birmingham v. Roosevelt Westmoreland, No. 20792	1	225
Appeal bond (omitted in printing)	1	225
Complaint	2	225
Motion to strike	2	226
Demurrers	3	227
Judgment entry	5	229
Motion for a new trial and order overruling	7	231
Appeal bond to Court of Appeals (omitted in printing)	9	234
Transcript of evidence (omitted in printing)	11	234
Transcript of sentencing (omitted in printing)	25	234
Reporter's and clerk's certificates (omitted in printing)	30	234
Proceedings in the Court of Appeals of the State of Alabama, Judicial Department, 6 Div. 805	32	234
Assignment of errors	32	234
Order of affirmance	33	236
Application for rehearing and order overruling (omitted in printing)	34	236
Proceedings in the Supreme Court of Alabama, 6 Div. 753	34a	236
Proceedings on petition for certiorari (omitted in printing)	34a	236
Petition for certiorari (omitted in printing)	35	236
Order denying petition for writ of certiorari (omitted in printing)	38	236
Application for rehearing (omitted in printing)	39	236
Order overruling application for rehearing (omitted in printing)	40	236
Clerk's certificates (omitted in printing)	41	236

IX

	Original	Print
Record from the Circuit Court of the Tenth Judicial Circuit of Alabama in and for Jefferson County in the case of The City of Birmingham v. Jessie Walker, No. 20790	1	237
Appeal bond (omitted in printing)	1	237
Complaint	2	237
Motion to strike	2	238
Demurrers	3	239
Motion to exclude the evidence	5	241
Judgment entry	8	244
Motion for a new trial and order overruling	10	247
Appeal bond to Court of Appeals (omitted in printing)	12	249
Transcript of evidence	14	250
Appearances	14	250
Testimony of Richard C. Casey—		
direct	16	251
cross	17	252
Jesse H Walker—		
direct	20	255
cross	23	258
Transcript of sentencing (omitted in printing)	28	261
Reporter's and clerk's certificates (omitted in printing)	33	261
Proceedings in the Court of Appeals of the State of Alabama, Judicial Department, 6 Div. 803	35	261
Assignment of errors	35	261
Order of affirmance	36	262
Application for rehearing and order overruling (omitted in printing)	37	263
Proceedings in the Supreme Court of Alabama, 6 Div. 759	37a	263
Proceedings on petition for certiorari (omitted in printing)	37a	263
Petition for certiorari	38	263
Order denying petition for writ of certiorari (omitted in printing)	43	266
Application for rehearing (omitted in printing)	44	266

	Original	Print
Order overruling application for rehearing (omitted in printing)	45	266
Clerks' certificates (omitted in printing)	46	266

X

Record from the Circuit Court of the Tenth Judicial Circuit of Alabama in and for Jefferson County in the case of The City of Birmingham v. Willie J. Willis, No. 20793	1	267
Appeal bond (omitted in printing)	1	267
Complaint	2	267
Motion to strike	2	268
Demurrers	3	269
Judgment entry	5	271
Motion for a new trial and order overruling	7	273
Appeal bond to Court of Appeals (omitted in printing)	9	276
Transcript of evidence (omitted in printing)	11	276
Transcript of sentencing (omitted in printing)	25	276
Reporter's and clerk's certificates (omitted in printing)	30	276
Proceedings in the Court of Appeals of the State of Alabama, Judicial Department, 6 Div. 806	32	276
Assignment of errors	32	276
Order of affirmance	33	278
Application for rehearing and order overruling (omitted in printing)	34	278
Proceedings in the Supreme Court of Alabama, 6 Div. 760	34a	278
Proceedings on petition for certiorari (omitted in printing)	34a	278
Petition for certiorari (omitted in printing)	35	278
Order denying petition for certiorari (omitted in printing)	39	278
Application for rehearing (omitted in printing)	40	278
Order overruling application for rehearing (omitted in printing)	41	278
Clerks' certificates (omitted in printing)	42	278
Order allowing certiorari	44	279
Stipulation as to printing of the record	45	279

[fol. 1] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA, IN AND FOR JEFFERSON COUNTY

No. 20780

THE CITY OF BIRMINGHAM,

vs.

JAMES GOBER.

APPEAL BOND—Filed May 4, 1960

The State of Alabama)
) City of Birmingham
Jefferson County)

We, James Gober, principal and Jas Esdale sureties, acknowledge ourselves indebted to the City of Birmingham, a municipal corporation, in the sum of Three Hundred Dollars, for the payment of which, well and truly to be made, we bind ourselves, our administrators, and executors. But the condition of the above obligation is such, that whereas the above bounden principal was tried and convicted on the charge of

Count 1. Trespass After Warning Sec 1436 GCC and has prayed and obtained an appeal to the Circuit Court of Jefferson County, Alabama, from the judgment of the Recorder's Court of the City of Birmingham, adjudging him to pay a fine of One Hundred no/100 Dollars, Costs Five Dollars; and to perform hard labor for 180 Days rendered the 4 day of April 1960.

Now, if the said principal shall appear at present Term of the Circuit Court of Jefferson County, Alabama, and from term to term thereafter until discharged by law, then this obligation to be void, otherwise to remain in full force and effect. And as against this obligation we waive all

right under the laws of Alabama to claim any personal property as exempt from levy and sale.

Witness out hand and seals this 4th day of April, 1960.

James Gober (L.S.), 226 Johnson St., Jas Esdale (L.S.), 809 No 21st., By Lacey Alexander (L.S.), Atty In fact.

Approved 4 day of April, 1960.

William Conway, Recorder of the City of Birmingham.

COUNSEL'S NOTE RE RECORD

The appeal bond in the Circuit Court printed in the *Gober* case is identical to the appeal bonds in the cases of the other 9 petitioners except for the names and addresses of the petitioners involved.

[fol. 2] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20780

CITY OF BIRMINGHAM, a Municipal Corporation, Plaintiff,

vs.

JAMES GOBER, Defendant.

COMPLAINT—Filed October 10, 1960

Comes the City of Birmingham, Alabama, a municipal corporation, and complains that James Gober, within twelve months before the beginning of this prosecution and within the City of Birmingham or the police jurisdiction thereof, did go or remain on the premises of another, said premises being the area used for eating, drinking, and

dining purposes and located within the building commonly and customarily known as Pizitz Department Store, located at 1821 2nd Avenue, North, Birmingham, Alabama, after being warned not to do so, contrary to and in violation of Section 1436 of the General City Code of Birmingham of 1944.

Watts E. Davis, Attorney for City of Birmingham.

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20780

CITY OF BIRMINGHAM,

vs.

JAMES GOBER.

MOTION TO STRIKE—Filed October 10, 1960

Comes now James Gober, defendant in this cause, and moves to strike the complaint in this cause, and as grounds for said Motion, sets out and assigns the following, separately and severally:

1. That the complaint, affidavit, etc., is not sworn to.

2. That the allegations of the said complaint are so vague and indefinite, as not to apprise this defendant of what he is called upon to defend.

3. That the ordinance or statute upon which is founded the complaint in this cause, as applied to this defendant, as a citizen of the State of Alabama, and of the United States, constitutes an abridgment of the freedom of assembly, speech and liberties secured to the Defendant, by the Constitution and laws of the State of Alabama and the Four-
[fol. 3] teenth Amendment of the Constitution of the United States of America.

4. That the said ordinance or statute which is the basis for the affidavit, information or complaint in this cause, as applied to the defendant, constitutes an abridgment of privileges and immunities guaranteed defendant, as a citizen of the United States, in violation of the Constitution and laws of the State of Alabama, and of the Fourteenth Amendment of the United States Constitution.

5. That Section 824 of the General City Code of the City of Birmingham, as applied to this defendant, a Negro citizen of the United States, constitutes a denial of due process and equal protection of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

6. That the said affidavit, information or complaint, does not charge any offense, which is cognizable by this court.

Arthur D. Shores, J. Richmond Pearson, Orzell Billingsley, Jr., Peter A. Hall, Oscar W. Adams, Jr., Attorneys for Defendant.

[File endorsement omitted]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20780

CITY OF BIRMINGHAM,

vs.

JAMES GOBER.

DEMURRERS—Filed October 10, 1960

Comes now James Gober, defendant in this cause, and demurs to the complaint in this cause, and to each and every count thereof, separately and severally, and as grounds for such demurrer sets out and assigns the following, separately and severally:

1. The affidavit or information which supports the complaint in this cause, does not charge defendant with any offense under the Constitution and laws of the State of Alabama.

2. That the complaint, affidavit or information upon which this cause is based is insufficient to support prosecu-
[fol. 4] tion of this cause, in that no offense is charged which is cognizable by this Honorable Court.

3. That the allegations of the complaint and each count thereof are so vague and indefinite as not to apprise this defendant of what he is called upon to defend..

4. That the ordinance, Section 1436 of the 1944 General City Code of Birmingham, Alabama, as applied to this defendant, is invalid in that it violates Section 4, Article 1, of the Constitution of Alabama, and the First and Fourteenth Amendments to the Constitution of the United States of America.

5. That Section 1436 of the 1944 General City Code of Birmingham, Alabama, which supports the complaint, affidavit or information in this cause, as applied to this defendant, a citizen of the State of Alabama and of the United States, constitutes an abridgment of freedom of speech and assembly violative of rights and liberties secured the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

6. That the aforesaid ordinance as applied to defendant, in (sic) unconstitutional on its face in that it is so vague as to constitute a deprivation of liberty without due process of law in violation of the provisions of the Fourteenth Amendment to the United States Constitution.

7. That the said Ordinance or Statute in this case, as applied to defendant, constitutes an abridgment of privileges and immunities guaranteed defendant as a citizen of the United States, in violation of the Fourteenth Amendment to the United States Constitution.

8. That the said Ordinance, as applied to defendant, constitutes a denial of equal protection of the laws in violation

of the Fourteenth Amendment to the Constitution of the United States of America.

Arthur D. Shores, Orzell Billingsley, Jr., J. Richmond Pearson, Peter A. Hall, Oscar W. Adams, Jr., Attorneys for Defendant.

[File endorsement omitted]

[fol. 5]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20780

CITY OF BIRMINGHAM, Plaintiff,

versus

JAMES GOBER, Defendant.

MOTION TO EXCLUDE THE EVIDENCE—Filed October 10, 1960

1. The complaint charging defendant, a Negro, with violation of 1436 of the General City Code of Birmingham of 1944, to-wit, an alleged trespass upon land after being forbidden to enter or remain after told to leave is invalid in that the evidence establishes merely that defendant was peacefully upon the premises of Pizitz, an establishment performing an economic function invested with the public interest, as a customer, visitor, business guest or invitee, and there is no basis for the charge recited by the complaint other than an effort to exclude defendant from Pizitz Cafe because of his race or color; defendant, at the same time is excluded from equal service at the preponderant number of other similar eating establishments in Birmingham, Alabama; thereby depriving him of liberty without due process of law and of the equal protection of the laws secured by the 14th Amendment of the United States Constitution.

2. The evidence offered against defendant, a Negro, in support of the complaint charging him with violation of trespass upon land after being forbidden to enter establishes that he was, at the time of arrest and at all times covered by the charge, in peaceful exercise of constitutional rights to assemble with others for the purpose of speaking and protesting against the practice, custom and usage of racial discrimination in Pizitz, an establishment performing an economic function, invested with the public interest; that defendant peacefully was attempting to obtain service in the facilities of Pizitz in the manner of white persons similarly situated, and at no time was defendant defiant or in breach of the peace and was at all times upon an area essentially public, wherefore defendant has been denied rights secured by the due process and equal protection clauses of the 14th Amendment of the United States Constitution.

3. The evidence establishes that prosecution of defendant was procured for the purpose of preventing him from engaging in peaceful assembly with others for the purpose of speaking and otherwise peacefully protesting in public places the refusal of the preponderant number of stores, facilities and accommodations open to the public in Bir-
[fol. 6] mingham, Alabama to permit defendant, a Negro, and other members of defendant's race from enjoying the access to such stores, facilities and accommodations afforded members of other races; and that by this prosecution, prosecuting witnesses and arresting officers are attempting to employ the aid of the Court to enforce a racially discriminatory policy contrary to the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States.

4. The evidence against defendant, a Negro, in support of the complaint charging him with violation of trespass upon land after being forbidden to enter clearly indicates that defendant at the time of his arrest, had accepted an invitation to enter and purchase articles in Pizitz, a store open to the public, but had not been allowed to obtain food service on the same basis as that offered white persons, because of defendant's race or color; and, that in fur-

therance of this racially discriminatory practice of Pizitz, defendant was arrested on the basis of race or color, under color of law, to enforce Pizitz's racially discriminatory policy, thereby violating defendant's rights under the equal protection and due process clauses of the 14th Amendment of the United States Constitution.

5. The statute or ordinance (1436 of the General City Code of Birmingham of 1944) under which defendant, a Negro, was arrested and charged is unconstitutional on its face by making it a crime to be on public property after being asked to leave by an individual at such individual's whim, in that said statute does not require that the person making the demand to leave present documents or other evidence of possessory right sufficient to apprise defendant of the validity of the demand to leave, all of which renders the statute so vague and uncertain as applied to defendant as to violate his rights under the due process clause of the 14th Amendment of the United States Constitution.

6. Section 1436 of the General City Code of Birmingham of 1944 under which defendant, a Negro, was arrested and charged with violation of trespass upon land after being forbidden to enter is on the evidence unconstitutional as applied to defendant in that it makes it a crime to be on property open to the public after being asked to leave, because of race or color, in violation of defendant's rights under the due process and equal protection clauses of the 14th Amendment of the United States Constitution.

7. The evidence against defendant, a Negro, establishes that he, at the time of arrest and all times covered by the [fol. 7] complaint, was a member of the public, peaceably attempting to use a publicly owned facility, to-wit: Pizitz and from which defendant was barred because of his race or color; that such denial was in accordance with a policy, custom and usage of Pizitz, of operating such facilities and services on a racially segregated basis, which policy, custom and usage violates the due process and equal protection clauses of the 14th Amendment of the Constitution of the United States.

8. The evidence offered against the defendant, a Negro, establishes that at the time of arrest and all times covered by the complaint he was a member of the public, attempting to use a facility, Pizitz, open to the public, which was denied to him solely because of race or color; that Pizitz, was and is offering, for a price, to serve all members of the public with food; that this public facility Pizitz, is, along with others of a similar nature, performing a necessary service for the public, which in fact, would have to be provided by the state if Pizitz and other like facilities were all to withdraw said service; that having determined to offer said valuable service to the public, Pizitz is required to provide such service in the manner of state operated facilities of a like nature, to-wit: That Pizitz may not segregate or exclude defendant on the ground of race or color, in violation of the due process and equal protection clauses of the 14th Amendment of the United States Constitution.

Arthur D. Shores, Oscar W. Adams, Jr., J. Richmond Pearson, Orzell Billingsley, Jr., Peter A. Hall, Attorneys for Defendant.

[File endorsement omitted]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

Appealed from Recorder's Court

(Trespass After Warning)

Honorable Geo. Lewis Baines, Judge Presiding

CITY OF BIRMINGHAM,

vs.

JAMES GOBER.

JUDGMENT ENTRY—October 10, 1960

This the 10th day of October, 1960, came Wm. C. Walker, who prosecutes for the City of Birmingham, and also came

the defendant in his own proper person and by attorney, and the City of Birmingham files written Complaint in this cause, and the defendant being duly arraigned upon [fol. 8] said Complaint for his plea thereto says that he is not guilty; and defendant files motion to strike, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion the defendant hereby duly and legally excepts; and the defendant files demurrers, and said demurrers being considered by the Court, it is ordered and adjudged by the Court that said demurrers be and the same are hereby overruled, to which action of the Court in overruling said demurrers the defendant hereby duly and legally excepts; and the defendant files motion to exclude the evidence, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion, the defendant hereby duly and legally excepts; and on this the 11th day of October, 1960, the Court finds the defendant guilty as charged in the Complaint and thereupon assessed a fine of One Hundred ($100.00) dollars and costs against said defendant. It is therefore considered by the Court, and it is the judgment of the Court that said defendant is guilty as charged in said Complaint, and that he pay a fine of One Hundred ($100.00) dollars and costs of this cause.

And said defendant being now in open Court, and having presently failed to pay the fine of $100.00 and the costs of $5.00 accrued in the Recorder's Court of the City of Birmingham, or to confess judgment with good and sufficient security for the same, it is therefore considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said James Gober, perform hard labor for the City of Birmingham for fifty-two days, because of his failure to pay said fine and costs of $5.00 accrued in said Recorder's Court, or to confess judgment with good and sufficient security therefor.

It is further considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said James Gober, perform additional hard labor for the City of Birmingham for thirty days, as additional punishment in this cause.

And the costs legally taxable against the defendant in this cause amounting to forty-eight and 75/100 ($48.75) dollars, not being presently paid or secured, and $4.00 of said amount being State Trial Tax, $3.00, and Law Library Tax, $1.00, leaving forty-four and 75/100 ($44.75) dollars taxable for sentence, it is ordered by the Court that said defendant perform additional hard labor for the County for sixty days, at the rate of 75 cents per day to pay said costs. It is further ordered by the Court that [fol. 9] after the sentence for the City of Birmingham has expired, that the City authorities return the defendant to the County authorities to execute said sentence for costs.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in this behalf expended for feeding the defendant while in jail, for which let execution issue.

And on this the 11th day of October, 1960, the defendant files motion for a new trial in this cause, and said motion coming on to be heard and determined by the Court, it is ordered by the Court, and it is the judgment of the Court that said motion be and the same is hereby overruled.

And notice of appeal being given, and it appearing to the Court that, upon the trial of this cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Appeals of Alabama, it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at $300.00, conditioned as required by Law.

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20780

CITY OF BIRMINGHAM, a Municipal Corporation, Plaintiff,

vs.

JAMES GOPER, Defendant.

MOTION FOR A NEW TRIAL—Filed October 11, 1960

Now comes the defendant, in the above styled cause, and with leave of the Court, first had and obtained, and moves this Honorable Court to set aside the verdict and judgment rendered on to-wit, the 11th day of October, 1960, and that this Honorable Court will grant the defendant a new trial, and as grounds for said Motion sets out and assigns the following, separately and severally:

1. That the Judgment of the Court in said cause is contrary to the law.

2. For that the judgment of the Court is contrary to the facts.

3. For that the judgment of the Court is contrary to the [fol. 10] law in the case.

4. In that the judgment of the Court is not sustained by the great preponderance of the evidence in the case.

5. For that the Judgment of the Court is not sustained by the great preponderance of the evidence in the case.

6. For that the Judgment of the Court is so unfair, as to constitute a gross miscarriage of justice.

7. For that the sentence is excessive.

8. For that the Court erred in overruling objections, by the defendant to the introduction of evidence offered on behalf of the City of Birmingham, Alabama, in this case.

9. For the Court erred in overruling objections by the defendant to the introduction of evidence which was so biased and prejudiced that the defendant was denied the right of a fair and impartial trial.

10. For the Court erred in overruling objections by the defendant to the introduction of evidence, which was so biased and prejudiced that the defendant was denied the right of a fair and impartial trial.

11. The Court erred in overruling defendant's demurrers filed in this cause.

12. The Court erred in overruling the defendant's Motion to Strike the Complaint in this cause.

13. The Court erred in finding the defendant guilty of violating the laws or ordinances of the City of Birmingham, Alabama, in that the laws or ordinances under which this defendant was charged and convicted, and as applied to this defendant, constituted an abridgment of freedom of speech violative of rights and liberties secured to the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

14. That the Court erred in refusing to find that the ordinance under which this defendant was being tried, as applied to this defendant, constituted a denial of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

15. That the Court erred in finding the defendant guilty of violating the laws or ordinances of the City of Birmingham, Alabama, in that the laws or ordinances under which this defendant was charged and convicted, and as applied to this defendant, constituted a deprivation of liberty without due process of law, in violation of the Constitution of the State of Alabama, and the provisions of the Fourteenth [fol. 14] Amendment to the United States Constitution.

16. The Court erred in overruling defendant's Motion to exclude the evidence in this case.

17. That it appeared from the evidence that no owner of the premises involved, had caused the arrest and prosecution of the defendant, but that such arrest was procured by the officials of the City of Birmingham, Alabama, without first having a complaint from such owner, or other person in charge of such premises.

18. For that it appears from the evidence that the defendant was not prosecuted by the owner of private property as provided for by the pertinent laws or ordinances of the City of Birmingham, but by police officials.

19. For that it appears from the evidence affirmatively that no owner or other person in charge of the premises involved, or otherwise, having authority to do so, procured the arrest of the defendant or signed a complaint or swore out a warrant against defendant for trespass on private property.

20. For that it affirmatively appears that the defendant was not requested to leave the premises of the store involved, but was only told to go elsewhere in the store.

Arthur D. Shores, Orzell Billingsley, Jr., Peter A. Hall, J. Richmond Pearson, Oscar W. Adams, Jr., Attorneys for Defendant.

ORDER OVERRULING

The foregoing Motion being presented in open court, this the 11th day of October, 1960; the same being considered and understood, the Court is of the opinion that the same should be overruled.

Geo. Lewis Bailes, Circuit Judge.

[File endorsement omitted]

[fol. 12]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

APPEAL BOND TO COURT OF APPEALS

Filed October 11, 1960

The State of Alabama)
)
Jefferson County)

Know All Men By These Presents, That we James Gober principal, and James Esdale & Willie Esdale as sureties, are held and firmly bound unto the State of Alabama in the sum of Three Hundred Dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents; and we and each of us waive our rights of exemption under the Constitution and laws of the State of Alabama as against this bond.

The Condition of the Above Obligation Is Such, That whereas; the above bounden James Gober was on the day of Oct 11 1960, convicted in the Circuit Court of Jefferson County, Alabama, for the offense of Trespassing After Warning and had assessed against him a fine of One Hundred Dollars, together with the cost of this prosecution, and on the 11 day of October, 1960, on failure to pay fine was sentenced to perform hard labor for the County for ..... days, and an additional term for the cost, at the rate of seventy-five cents per day, and as additional punishment imposed the defendant was sentenced to perform hard labor for the County for 30 days, from which sentence the said ..... has this day prayed and obtained an appeal to the Court of Appeals of Alabama.

Now, if the Said James Gober shall appear and abide such judgment as may be rendered by the Court of Appeals, and if the judgment of conviction is affirmed, or the appeal is dismissed, the said James Gober shall surrender himself to the Sheriff of Jefferson County, at the County Jail, within fifteen days from the date of such affirmation or

dismissal, then this obligation to be null and void, otherwise to remain in full force and effect.

Given under our hands and seals, this the 11 day of Oct. 1960.

James Gober (L.S.), James Esdale (L.S.), Willie Esdale (L.S.), By A. E. Brooks (L.S.) Atty In Fact.

Approved: Julian Swift, Clerk of the Circuit Court of Jefferson County.

[File endorsement omitted]

COUNSEL'S NOTE RE RECORD

The appeal bond to the Alabama Court of Appeals, printed in the *Gober* case, is identical to the appeal bonds in the cases of the other 9 petitioners except for the names and addresses of the petitioners.

[fol. 13]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA
IN AND FOR JEFFERSON COUNTY

No. 20780

CITY OF BIRMINGHAM,

versus

JAMES GOBER.

Transcript of Evidence—October 10, 1960

Birmingham, Alabama

Before: Honorable George L. Bailes, Judge.

APPEARANCES:

For the City, Mr. Watts E. Davis.

For the Defendants, Messrs. A. D. Shores, Oscar Billingsley, Jr., Peter A. Hall, Oscar W. Adams, Jr., J. Richmond Pearson.

[fol. 15]

Proceedings

The Court: Are the defendants ready?

Mr. Shores: We are ready, Your Honor.

Mr. Billingsley: Your Honor, here is a motion to strike.

The Court: Are they identical?

Mr. Billingsley: Yes, sir.

The Court: The charges are identical and the motions are identical, is that right?

Mr. Billingsley: Yes, sir.

The Court: I take it that a copy of the complaint has been served upon counsel for defendants?

Mr. Davis: Yes, Your Honor.

The Court: I take it that the motion to strike by the defendants has been served upon the Solicitor for the City?

Mr. Davis: Yes, sir.

The Court: Please let the motion to strike be overruled.

Mr. Billingsley: We take an exception, Your Honor. And next we have some demurrers we would like to file in each case.

The Court: All right, please let the demurrers be overruled.

Mr. Billingsley: We would like to take exceptions.

Mr. Davis: If the Court pleases, we would like to invoke the rule.

(Witness Placed Under the Rule)

E. K. MARTIN, called as a witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Davis:

Q. Will you state your name?

A. E. K. Martin.

Q. Mr. Martin, by whom are you employed and in what capacity?

A. I am employed by the City of Birmingham as a Police Officer.

Q. And were you employed by the City of Birmingham [fol. 16] on March 31, 1960, sir?

A. Yes, sir, I was.

Q. Did you have occasion on the morning of March 31, of this year, to visit the Pizitz Department Store?

A. Yes, sir, I did.

Q. Is that located in the City of Birmingham?

A. Yes, sir.

Q. I believe it is at Second Avenue and 19th Street, North?

A. Yes, sir.

Q. At about what time did you visit the store, Mr. Martin?

A. It was approximately 10:50.

Q. Had you had a report of any disturbance or a commotion there at the store?

A. Yes, sir, we had.

Q. You went there in the performance of official duty then?

A. Yes, sir.

Q. Did you have occasion to go to the Cafeteria or the eating or dining area there at Pizitz?

A. Yes, sir, I did.

Q. When you got to the dining or eating area what did you find that was unusual or out of the ordinary?

A. Well, I found that the cafeteria part was closed to all customers and I found two Negro males sitting in the eating part of the cafeteria.

Q. Do you know the name of the two Negroes that were there?

A. James Davis and James Gober.

Q. Do you see them in the Courtroom?

A. Yes, sir, that is them sitting behind Arthur Shores.

Q. What were they doing there, if anything, Officer Martin?

A. They were sitting there just talking to one another.

Q. Did anyone say anything to either of these two defendants in your presence or hearing there on that occasion?

A. No, sir, they did not.

Q. Did you place them under arrest?

[fol. 17] A. Yes, sir.

Q. Did you talk with any of the personnel of the Pizitz Store there in their presence or hearing that morning?

A. Not in their presence or hearing I did not, no, sir.

Q. I believe you testified here, did you, that you put them under arrest?

A. Yes, sir.

Mr. Davis: I believe that is all.

Cross examination.

By Mr. Shores:

Q. Officer, I believe you said you were informed or you received a report that there was a disturbance at Pizitz?

A. Yes, I did.

Q. Are you a patrolman or were you at headquarters or in a squad car?

A. No, I am in the Traffic Department and I was working the corner of Second Avenue and 19th Street.

Q. Who made this report to you?

A. It came from a superior officer.

Q. Was the superior officer there at Pizitz?

A. Yes, he was.

Q. Was he, where were you stationed when you received this report?

A. I was stationed at Second and 19th.

Q. You were not in Pizitz when you received the report?

A. No, I was not.

Q. How did you receive the report?

A. I received it by mouth from a superior officer.

Q. He just came by and told you that there was a disturbance at Pizitz?

A. That is correct.

Q. And did he request you to go and check on the disturbance?

A. He ordered me to do so.

Q. Did any individual connected with the store request [fol. 18] you to do anything after you got there?

A. They didn't request me personally. They were talking to superior officers and none of them requested me to do anything.

Q. Who requested you to make these arrests?

A. My immediate superior officer.

Q. What is your superior officer's name?

A. Sergeant Dan Purvis.

Q. Did you observe any disturbance going on?

A. I noticed James Gober and James Davis sitting there at the lunch counter in a booth.

Q. I believe you stated they were just talking to each other.

A. That is correct.

Q. Did you approach them and place them under arrest?

A. Not immediately I did not. I remained at the cashier's cage you might say until I was ordered to go back and do so.

Q. You were ordered by your superior officer?

A. That is correct.

Q. What charge did you place against the defendants?

A. Trespassing after warning.

Q. Did you warn them?

A. Did I warn them?

Q. Yes.

A. No, I did not.

Mr. Shores: That is all.

Mr. Davis: That is all, Mr. Martin.

(Witness excused)

Mr. Davis: Mr. Gottlinger.

JOHN I. GOTTLINGER, called as a witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Davis:

Q. State your full name?

A. John I. Gottlinger.

Q. Mr. Gottlinger, by whom and in what capacity are you employed?

[fol. 19] A. I am employed by Pizitz. I am Controller of the store.

Q. On March 31, 1960, about 10 or 10:30 in the morning did you have occasion to observe two Negro boys seated in the lunch area or the eating area at Pizitz store?

A. Yes, sir.

Q. Did you have any conversation or make any statements or remarks to either of these two boys?

A. I didn't make any remarks to them.

Q. Did you hear any remarks or statements made by either of the defendants?

A. Yes, sir.

Q. What were those remarks or statements?

A. They were told that they could not be served in that area.

Mr. Hall: If Your Honor pleases we object. It is not responsive. The question was any remarks or statement made by the defendants.

The Witness: I am sorry I misunderstood him.

Q. Did you hear any remarks made or statements made by either of the defendants Davis or Gober?

A. One of them, a statement to the effect that we should call the police.

Q. Did anyone in your presence and hearing tell them they would have to leave the store, they couldn't be served or words to that effect?

Mr. Shores: I object to that, purely hearsay as to what someone told him unless he can connect it up properly.

The Court: Read the question.

(Question read)

The Court: I overrule the objection.

Mr. Hall: Judge, we would like to object further whether anyone, unless it is shown that anyone had the authority to tell them that. It might have been a customer.

Mr. Davis: I will amend that question.

The Court: I think that is correct.

Q. Did an employee of Pizitz Store have any conversa [fol. 20] tion in your presence?

A. Yes, sir.

Q. With the two defendants?

A. Pardon?

Q. With the two defendants?

A. Yes, sir.

Q. What was that conversation?

A. They were asked—

Mr. Hall: If Your Honor pleases, we would like to object to the question unless it is shown who the employee might be and whether they had some authority to say what was said or unless it is shown what the conversation was. Otherwise, I think it is irrelevant and immaterial and we object to it without a showing that any employee who might have said anything to these defendants in Mr. Gottlinger's presence was an employee with some authority to say something pertinent to the issues involved here and what was said was pertinent to the issues involved. Otherwise it is irrelevant and immaterial.

The Court: Did the person who spoke to the two defendants work for the store?

The Witness: Yes, sir.

The Court: And were they authorized to serve or not serve the people in that part of the store?

The Witness: Well the employee was not a waiter or waitress in the restaurant.

Mr. Davis: If the Court pleases, could I interject another question at this point.

Q. The person or persons that you heard have a conversation with the two defendants was this person an employee of the store and was the conversation with reference to

whether or not they would receive service or whether or not they might or might not have to leave the premises or the area?

Mr. Hall: If Your Honor pleases, we object to any answer to that question unless it can be shown that who-
[fol. 21] ever this person was, whether or not he was an employee of this store had the right to speak for Pizitz on whatever the issues are involved here and if whatever was said is pertinent to the issues. As I understand it, Pizitz is a department store with employees of any number of departments and employees in one department have absolutely no authority over other employees. You have some lease departments, don't you?

The Witness: Yes, sir.

Mr. Hall: So just an employee of Pizitz would not have the authority to speak or to say anything in another department necessarily.

Mr. Davis: I withdraw the question.

Q. Who did you observe having a conversation on this occasion with the two defendants?

A. Dick Pizitz.

Q. I beg your pardon?

A. Dick Pizitz.

Q. Dick Pizitz.

A. Yes.

Q. What is his affiliation with the company?

A. He is Assistant to the President.

Q. Assistant to the President?

A. Yes, sir.

Q. What statement, if any, did he make to either or both the defendants?

A. He asked the defendants to leave the tea room area, told them that they could be served in the Negro restaurant in the basement.

Q. And I believe I understand you to say that you made no statement whatever to them?

A. No, sir.

Q. That is all—one other question—did they leave when Mr. Pizitz asked them to leave?

A. No, sir.

Q. And do you know whether both remained there until [fol. 22] the officers arrived?

A. They remained until the officers came.

Cross examination.

By Mr. Hall:

Q. Did Mr. Pizitz simply ask them to leave the tea room area and tell them they might be served in the basement or did he order them—

A. He told them that they couldn't be served there and we had facilities in the basement to serve them.

Q. Did he tell them—

A. He told them it would be against the law to serve them there.

Q. He told them it would be against the law to serve them there. What law did he have in mind, do you know?

A. I don't know.

Q. He didn't say it was against Pizitz policy to serve them there?

A. He used the term "we cannot serve you here."

Q. And you assume that he meant it was against the law?

A. I assumed that.

Q. Is that because you know that there is a law of the City of Birmingham requiring separate facilities?

Mr. Davis: We object to that, calls for a conclusion.

The Court: I would leave it out.

Q. Do you know of your own knowledge that there is such a regulation of the City of Birmingham?

Mr. Davis: We object to that, if the Court pleases.

The Court: Would any witnesses knowledge of the law be material?

Mr. Hall: Possibly, Your Honor. It is our theory of this case it is one based simply on the City's segregation ordinance and Mr. Gottlinger, Mr. Pizitz, the police officers and everybody involved acted simply because of the segregation law and not because it was Pizitz policy.

[fol. 23] The Court: Aren't we dealing with laws instead of policies?

Mr. Hall: As I understand it it is the theory of the City's case, it is trespass after warning. Our contention is that that is not a fact at all, it is simply an attempt to enforce the segregation ordinance and we are attempting to bring it out.

The Court: Does the complaint cite some statute?

Mr. Hall: Trespass after warning. If we went only on the complaint it would seem that some private property has been abused by these defendants and that the owner of this property has instituted this prosecution. From the witness' answers it doesn't seem to be the case. It seems it is predicated on the segregation ordinance of the City of Birmingham rather than on the trespass. So what we are trying to bring out is whether or not the acts of Pizitz were based on the segregation ordinance or something that has to do with trespass on the property.

The Court: The action of Pizitz is not material as I conceive it.

Mr. Hall: Our theory of the case, we assume that Pizitz action was very material and any justification these men have would be based on their right.

The Court: I didn't mean factually, I meant as a matter of policy. I heard you use the word policy, Mr. Pizitz policy would not be material as I conceive this.

Mr. Hall: If Your Honor pleases, may I say this. We are not arguing with the Court. What I say unless Mr. Pizitz had ordered these men out of the restaurant facilities they would not have been arrested and could not have been prosecuted under the statute.

The Court: Is there any divergence between you and the City on that theory?

Mr. Hall: I don't know, sir.

The Court: Unless they had failed to comply with some trespass, some warning after trespass. Isn't that what it is?

Mr. Hall: I suppose so.

The Court: Is that the issue. Is that the thing which is [fol. 24] germane?

Mr. Hall: It certainly is, Your Honor.

Mr. Davis: I want to object to the references to the segregation ordinance. This ordinance has nothing to do with the matter of segregation and applies to anybody on the premises of another who is asked to leave and refuses. Segregation is not mentioned in the ordinance.

The Court: Wouldn't it apply equally to everybody. I overrule the objection.

Mr. Hall: Did you say you overruled the objection and may I continue?

The Court: Yes.

Q. Are you aware of the ordinance?

A. I have heard of it.

Mr. Davis: I am not sure I understand. He is to testify as to what the ordinance is?

The Court: I don't believe the witness' knowledge of the law involved is competent.

Mr. Hall: Well we withdraw that question.

Q. Did you or any official at Pizitz call the police?

A. No, sir.

Q. Did you subsequently make a complain to the Police Department?

A. I was called, a policeman came up to me and asked me if I had witnessed the affair and I don't know if I was complaining or what, He asked me my name and who witnessed it and I was the one.

Q. So you didn't call him, he called you?

A. He didn't call me. He came in there.

Q. Called you and asked you if you saw it?

A. Yes, sir.

Q. At this time had the defendant been put under arrest?

A. What was the question?

Q. At this time had the two young Negro boys been arrested?

A. Yes, sir.

Q. They had already been arrested?

[fol. 25] A. I don't know. They were taking them out of the restaurant.

Q. That was before the policeman talked to you about whether or not you witnessed it?

A. Yes.

Q. So far as you know no official at Pizitz had filed a complaint with the Police Department at that time?

A. That is right.

Mr. Hall: Thank you.

Redirect examination.

By Mr. Davis:

Q. Mr. Gottlinger, do you have any knowledge on the subject of whether anyone else called the police in this case?

A. No, I don't know.

Q. Can you say as a fact you know no official at Pizitz called the police?

A. I could say it is a fact to my knowledge no official at Pizitz called the police.

Q. You would not say they did not?

A. I couldn't say they did not.

Mr. Davis: That is all.

Recross examination.

By Mr. Hall:

Q. One other question. Have you since learned that any official at Pizitz did make such a complaint?

A: No, I haven't.

Mr. Hall: Thank you.

Mr. Davis: Mr. Pierce.

The Court: Is that all for Mr. Gottlinger?

Mr. Davis: Yes, sir. May he be excused?

The Court: Yes, you may be excused.

(Witness excused.)

[fol. 26] C. L. PIERCE, called as a witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Davis:

Q. Are you Detective C. L. Pierce?
A. Yes, sir.
Q. Are you with the City of Birmingham?
A. Yes, sir.
Q. Were you with the City of Birmingham on April 1, 1960?
A. Yes, I was.
Q. I will ask you if on April 1, 1960 you had occasion to talk with either or both the following, James Gober, James Albert Davis?
A. I did, yes, sir.
Q. Where did that conversation take place?
A. At the City Hall.
Q. Was that about ten or 10:20 in the morning of that day?
A. It was.
Q. Was James Albert Davis' father present on that occasion?
A. He was.
Q. Is he a Minister here in the City?
A. He is.
Q. I will ask you if on that occasion you asked James Albert Davis if he was arrested in company with anyone else on March 31, 1960 and if he answered yes, James Gober.
A. That is right.
Q. I will ask you if you asked him if he was a student, that is asked James if he was a student at Daniel Payne College and he answered yes, sir. I will ask you if you asked him?
A. That is right.
Q. I will ask you if you asked him if they had had a meeting at the home of Reverend Shuttlesworth?

Mr. Shores: Your Honor, we want to object to that line of questioning. He is asking about a conversation he had

with the defendant on April 1, and this incident occurred on March 31. He is not asking any questions with respect to trespass.

[fol. 27] The Court: Would it be the day following?

Mr. Davis: The day following, they had a discussion with the defendant about what took place, if the Court pleases, on the prior day, and what arrangements they had made. It all sheds light on what took place leading up to the sequence of events regarding the corpus delicti.

The Court: I assume anything Officer Pierce said to James Albert or to James Gober and that they said to him on the day following the arrest might be in close enough proximity to be competent.

Mr. Hall: If Your Honor pleases, if what Detective Pierce is about to testify to is in the nature of some confession or something else we would like to examine the detective on Voir Dire before it comes in. We don't know what he is going to talk about and we don't know whether it is admissible.

Mr. Davis: He is perfectly entitled to that. I neglected to lay a predicate. I will be happy to do it.

Q. On the occasion of this statement which James Gober and James Albert Davis made in your presence and in the presence of James Albert Davis' father at the City Hall on April 1, 1960 was there any threat of bodily harm if they did make a statement or did not make a statement or any promise of reward or hope of reward if they did so. Were they told it would be better if they did or worse for them if they did not make a statement on that occasion?

A. No, sir.

Q. On this occasion did James Albert Davis or James Gober tell you that they had a meeting prior to their going to Pizitz?

Mr. Hall: If Your Honor pleases, we object. We haven't established that this is admissible yet. Counsel has asked if there was any threats. I didn't hear Mr. Pierce's answer.

Mr. Davis: He said there was not.

Mr. Hall: We would like to go further and offer something in refutation.

[fol. 28] Examination on voir dire.

By Mr. Hall:

Q. Detective Pierce, you had placed them under arrest?
A. They were under arrest. I hadn't arrested them.
Q. Had they been allowed bond or bail at that time?
A. No, I don't think they had.
Q. Isn't it a fact that arrangements had been made to bond them out but they were not released, had not been released at that time?
A. I can't say that. I can't answer that.
Q. They were not at the City Jail but at the City Hall?
A. That is right.
Q. They had been in jail overnight, is that true?
A. They had.
Q. And you are not aware, you don't know whether a bonding company or official of a bonding company had been attempting to bail them out for the past twelve hours' prior to that time?
A. I couldn't say.
Q. Did you tell them that they were seriously involved in some infraction of the law and cooperation with the City was necessary for them to get free, to be able to get free and go back to school?
A. No, I didn't. Reverend Davis had talked to them.
Q. You hadn't done that yourself?
A. He talked to them. What he said I don't know.
Q. Had you talked to Reverend Davis and told him they were seriously involved?
A. I stated to him what they were charged with and I told him I would like for them to tell me the truth about what happened.
Q. At this time did they have a lawyer present?
A. Not at the time they made the statements.
Q. They didn't have a lawyer present at all?
A. No.

Mr. Hall: If Your Honor pleases, I would like to put one of the defendants on the stand for the purpose of [fol. 29] putting in a little rebuttal testimony with refer-

ence to the voluntariness of whatever they may have said before it is admitted.

The Court: Any objection on the part of the City?

Mr. Davis: I think there is a proper place for that and not on Voir Dire. I think he should put his witnesses on the stand at the proper time. We have this witness to testify as to what the facts are.

Mr. Hall: If Your Honor please, in this instance the Voir Dire is to decide whether or not this confession can come to the Court or Jury, if we had one. Once what is alleged to have been said is given to the Court or Jury it would make no difference later on if we showed it was voluntary or involuntary. As I understand the purpose the Voir Dire is to be done out of the presence of the Jury if you have one, the testimony for and against is put at that time before the Court in order to ascertain whether or not whatever is alleged to have been said was voluntary. Most of the Alabama cases where there has been a refusal to allow a defendant to testify on that one point and that one point only has been cited as error, rather than offer the defendant generally and subject him to general cross-examination. So the only thing we are attempting to ascertain now as I understand it, I don't know what he is going to bring out here but whatever the nature of the confession is we want to know whether it was done under duress, whether or not there was any promise. The detective says there was not. We want the defendants to say whether or not there were any promises or threats, and the Court can decide whether or not whatever they said was voluntary or involuntary.

Mr. Davis: We withdraw any objection if he wants to take them now.

The Court: Do you want to finish with the Captain first?

Mr. Davis: Whatever he wants is agreeable with the City.

(Witness temporarily withdrawn.)

[fol. 30] JAMES EDWARD GOBER, called as a witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hall:

Q. What is your name?
A. James Edward Gober.
Q. Are you a defendant in this case?
A. Yes, sir.
Q. Did you on April 1, last talk to Detective C. L. Pierce you see sitting there?
A. Yes, sir.
Q. Before talking with him what had occurred, that is what happened on March 31. Will you tell us what happened on that date?
A. I was arrested on the 31st and taken from the jail and taken to the City Hall.
Q. You were taken to the jail March 31, what time?
A. I can't exactly tell.
Q. Was it in the morning?
A. In the morning.
Q. In the morning of March 31?
A. Yes, sir.
Q. Did you know of anyone at that time attempting to get you out on bail?

Mr. Davis: We object to the bail procedure.
The Court: I believe that would be incompetent.
Mr. Hall: If Your Honor pleases we take an exception to that ruling because it is our contention that the mere holding in jail unnecessarily is a form of intimidation and the cases have so held.
The Court: Let the ruling stand.
Mr. Hall: Exception.

Q. On April 1 you talked with Detective Pierce. Was that the first time?
A. That was the second time.

[fol. 31] Q. That was the second time, when was the first time?

A. It was after we had been arrested.

Mr. Davis: Will you talk a little louder.

The Witness: After we had been arrested.

Q. On the day that you were arrested?

A. Yes, sir.

Q. On that day did he threaten you?

A. No.

Q. Did he tell you anything about the seriousness of whatever offense you were alleged to have perpetrated?

A. No, not on that day.

Q. Did he make you any promise if you would tell him anything?

A. On the day of arrest, the first time I spoke to him?

Q. Yes.

A. No, he didn't.

Q. On the second occasion April 1, did he threaten you or make you any promises?

Mr. Davis: I am going to object if the Court pleases to the leading question. I think he can accomplish it without putting the words in the witnesses mouth.

The Court: Wouldn't it be better to allow the witness to say what his words were and what Officer Pierce's words were?

Q. We will rephrase the question. Will you tell the Court what did happen, what Officer Pierce said to you on April 1?

A. On April 1, we were taken in and questioned one-by-one and I think I was the first one that was in jail at the time, and he asked us to tell the truth and if we did tell the truth that we would be, if we pleaded guilty they would try to help us, they would ask the Judge to let us off. In other words, it was a promise if we pleaded guilty they would try to help us.

Mr. Hall: That is all.

Cross examination.

By Mr. Davis:

Q. What time did you arrive at jail on March 31?

[fol. 32] A. I can't exactly tell the time.

Q. Was it about lunchtime?

A. It was in the morning.

Q. And what time did you go to the City Hall?

A. The following day, the City Hall. We didn't go on the 31st at the time we were arrested.

Q. I am talking about the next day?

A. On the 1st?

Q. When you had the conversation with Mr. Pierce.

A. On the 1st of April it was in the morning also. I can't say exactly, tell the time. I believe it was in the morning.

Q. You know Reverend Davis, don't you?

A. Yes, sir, I do.

Q. I believe he is the father of the boy that went with you to Pizitz, isn't he?

A. Yes, sir.

Q. Didn't, hadn't you counselled with Reverend Davis, hadn't you and your cohort on this occasion, his son, discussed the matter with Reverend Davis?

A. Us two individuals?

Q. You and Davis?

A. Us two individuals, no.

Q. You had not seen him prior to the time you went to the City Hall on the second day?

A. I didn't see him until we were released.

Q. Do I understand you to say you talked to Mr. Pierce one-by-one on the first day of April?

A. Yes, I was taken first and then the others. I think the others, I don't know whether they were together there but I was by myself talking to Mr. Pierce.

Q. Who was present in the room?

A. Reverend Davis and another detective, I think, I assume he was a detective.

Q. Reverend Davis is a colored man, isn't he?

A. Yes, sir.

[fol. 33] Q. Now you say that Detective Pierce said if you pleaded guilty he would try to help you.

A. He said they would try to help us.

Q. Who is they?

A. I don't know. He used the word they. In other words we, he said we will try to help you.

Q. Did he say he could get you off on this thing?

A. He just said he would ask the Judge.

Q. What did he say he would ask the Judge to do?

A. In other words, he said he would ask the Judge, in other words drop the case if we would plead guilty.

Q. Did he use those words, "Drop the case?"

A. No, sir, the exact words I can't tell you. But, in my words that is how I took it.

Q. Now what did Reverend Davis say to you on that occasion?

A. Reverend Davis I don't think he said anything. All he asked us was to tell the truth about the situation.

Q. To tell the truth about the situation and what did you tell the Reverend, you were going to tell the truth?

A. I told him that I was.

Q. That is when you first came in the room, wasn't it?

A. Yes, it was.

Q. The first person you talked with was Reverend Davis?

A. At the jail.

Q. At the City Hall when you went in the room?

A. No, the first person I talked with when I went in the room was Detective Pierce.

Q. Did he walk out of the room and leave you and the Reverend in there alone for awhile?

A. No, he didn't.

Q. Where were you sitting at a table?

A. I was sitting at the door.

Q. Was there a table there?

A. I think there is several tables.

Q. You spoke to the Reverend, didn't you?

[fol. 34] A. No, not personally I didn't.

Q. He asked you to tell the truth. Was that after Mr. Pierce had talked to you?

A. No.

Q. That was before Mr. Pierce talked to you?

A. He told all of us to tell the truth.

Q. Where did all of you meet with Reverend Davis?

A. He met with us in jail.

Q. Over at the southside?

A. No, in the City Hall.

Q. Was that the morning of April 1?

A. The morning of April 1, yes, sir.

Q. Didn't he talk with you in a room together?

A. No, nine of us.

Q. Were you in a room together?

A. Yes, sir.

Q. And the nine of you and Reverend Davis sat around and had a conference?

A. I wouldn't exactly call it a conference.

Q. You sat and discussed the matter, conferred?

A. Yes, sir.

Q. He advised each one of you to tell the truth?

A. Yes, he did.

Q. It was after the meeting with the nine of you with Reverend Davis that you went in and talked to Detective Pierce?

A. Reverend Davis left afterwards, and one of the detectives came in and he said he would like to question us about it and he told me, in fact he wanted to talk to me first and he chose me first, not voluntarily. He told me to come first and I went in.

Q. Why did he want to talk to you first? Did he figure you were the most honest one in the crowd?

A. I don't know. I kind of thought of that myself.

Q. The nine of you and Reverend Davis met and then you went and talked to Detective Pierce and Reverend Davis went with you, did he not?

[fol. 35] A. He was already in there. One of them said he had already left. And five to ten minutes later they came and got us individually and after they questioned me they took me back to the cell.

Q. Who was it that later asked you to change your testimony?

A. Asked me to change it?

Q. Yes, before you come to Court?

Mr. Hall: If Your Honor pleases, we object to that question. It has not been established anybody asked him to change any testimony.

Mr. Davis: I withdraw the question.

Q. Who-all was present with you when Detective Pierce promised you in your words which you don't remember exactly that he would help you if you pleaded guilty?

A. I think Reverend Davis and the other detective was the only ones.

Q. Did he threaten to make it any worse for you if you failed to make a statement?

A. No. In other words it was up to me voluntarily to do what I wanted to do in other words.

Q. You volunteered to come clean and make a clean breast of it?

A. That is the idea he gave me, if I wanted to do it I did it, and if I didn't I didn't have to. He made the suggestion it was a promise if I pleaded guilty.

Mr. Davis: That is all. Thank you.

The Court: Thank you, James, you may go.

Mr. Hall: If Your Honor pleases it is clearly shown that there was a promise made if they would tell the truth about whatever it is Detective Pierce wanted them to tell the truth that the City of Birmingham in the person of Detective Pierce would intercede, and try to get the Judge to go easy on them and dismiss the charges. So there was a promise held out for whatever they are trying to introduce and we insist and submit to Your Honor that whatever it is was involuntary in nature and clearly inadmissible.

[fol. 36] The Court: In the light of James' language that it was left up to me I will let the officer say what James said.

Mr. Hall: We want to except to Your Honor's ruling.

C. L. Pierce, recalled as a witness, having been previously duly sworn, testified further as follows:

The Court: What they both said of course.

Direct examination (continued).

By Mr. Davis:

Q. Officer Pierce, did you at any time did you tell James Gober that you would intercede in his behalf or words to that effect or that you thought it would go easier on him if he made a clean breast of this thing and told the truth about it?

A. No.

Q. Never did at any time?

A. No.

Q. Have you at any time helped them or interceded with the Court?

A. No.

Q. Or anyone else in his behalf to help him out?

A. I let Reverend Davis sign his bond.

Q. On this occasion did Gober or Davis or either in the presence of the other tell you that they had had a meeting at Reverend Shuttlesworth's house?

Mr. Hall: If Your Honor pleases, we object to the phrasing of this question. This is direct examination and it is clearly leading.

Mr. Davis: I will rephrase the question.

Q. Did either Gober or Davis make any statement or remarks concerning a meeting held where they were in attendance prior to this demonstration, the day prior to the demonstration or the sit-ins?

A. They did.

[fol. 37] Mr. Hall: We object to that question and to that answer, Your Honor.

The Court: Leave it in.

Mr. Hall: It is immaterial. Our objection is predicated on the fact that the question and answer are both clearly immaterial. The only issue involved here is whether or not this man is guilty of trespass after warning and a meeting at anybody's house at no time has any materiality.

The Court: Please leave the question and answer in the record.

Mr. Hall: We want an exception to that.

Q. Did they state or either of them state that they had received instructions as to what to do when they arrived at certain downtown stores on the demonstration?

Mr. Hall: If Your Honor pleases, we object to the question, not only to the question and the way it is phrased it is leading and suggestive and it is immaterial and irrelevant and has no bearing on this issue.

The Court: How would it do to let the officer now say what he said and what the defendant said, if anything.

Mr. Davis: That is quite all right.

Mr. Hall: Well we object to any question with reference to what meeting, what instructions any time, any place. The only issue in this case so far as this defendant is concerned is whether or not he was on the premises of Mr. Pizitz in this instance and refused to leave after warning.

The Court: Well the Court thinks, with all deference to all parties that if this officer and those two defendants had a conversation that every word either one of the three of them said at that time and place is competent and relevant. Now that is what the Court thinks. It could be wrong but I will let it be put in the record.

Mr. Hall: We want an exception, Your Honor.

Q. Did either of them on this occasion and in each other's presence tell you that the day prior to these sit-ins—

[fol. 38] Mr. Hall: If Your Honor please.

The Court: We are getting away from a repetition of the conversation. You have laid a predicate. You have put in the record in fact that the two defendants made statements to this witness and that this witness did nothing either positive or negative to cause them to make a statement. Now the next question is what did he say to them and what did they say to him? Will you tell the Court what you said to these two defendants on the occasion at the City Hall?

A. I talked to them separately. I think, my best recollection is that I talked to James Davis first. He came into the room and I asked him if he wanted to make a statement and answer my questions and tell what happened

and he said he did. And I then asked him if he had been, or where he went to school and he said he went to Daniel Payne College. And he told me that on Friday night he went from Daniel Payne College to Reverend Shuttlesworth's house and when he arrived there there were several other people there, and named other defendants in the case. He said that Reverend Billups was there, Reverend Shuttlesworth and Reverend Shuttlesworth's wife and that he was carried from Payne College to Reverend Shuttlesworth's house by either Reverend Shuttlesworth's wife or Reverend Billups—I believe he said Reverend Billups. There was two cars. On arriving there there was a sit-down demonstration which was considered or discussed at that meeting that night and volunteers were asked for and both Davis and Gober both said they volunteered to participate in the sit-down demonstration and that they were assigned stores to go to at a certain time and they said they did agree.

He stated, they both stated they were assigned and volunteered to go to Pizitz and that on the time agreed upon they did go to Pizitz and sat down at a lunch counter and that they remained there until the officers came in and arrested them, and that they made no effort and did not intend to leave until they were arrested, and that the purpose of that thing was to stay there until they were arrested. And they stated when they sat down they were [fol. 39] denied service there and asked to leave.

Q. Did they state whether or not they had instructions to do certain things after they arrived at the store or when they were to leave or anything on the subject?

Mr. Hall: If Your Honor pleases, for the record we object.

The Court: Excuse me a minute. It might be a little leading. If we could get back to the framework of having the witness say what he said and what each of the defendants said I believe we would be clearer.

Q. Did you ask either of the defendants if they had any specific instructions as to the length of time they were supposed to stay in the store?

A. Both defendants said they were supposed to stay in the store and did stay until the officers arrested them and carried them out.

Q. Did they indicate that they had any instructions as to what to do in the event they were asked to leave?

Mr. Hall: If Your Honor pleases we object to these leading questions.

Mr. Davis: I just asked if they said they had any instructions as to what to do.

The Court: Let him answer.

Mr. Hall: We except.

A. They said they were instructed to go into the store and sit down at a white lunch counter and that they would probably be or would be asked to leave and not to leave but to remain there until the police arrested them and took them out.

Mr. Davis: That is all.

Cross examination.

By Mr. Hall:

Q. Detective Pierce, they were arrested at a white lunch counter, were they not?

A. That is right I assume they were.

Q. There are colored lunch counters in the store?

A. I can't answer for that particular store. I am not sure.

Q. You don't know whether they were arrested at a [fol. 40] white lunch counter or not?

A. I didn't arrest them. So I assume they were arrested there. I don't know.

Mr. Hall: That is all. If Your Honor pleases we move to exclude all of this witness' testimony as being irrelevant, immaterial and as being absolutely outside of the issues in this case.

The Court: Overruled.

Mr. Hall: We want to take an exception, Your Honor.

The Court: Anything further from Captain Pierce? If not, you are excused, sir.

Mr. Davis: If the Court pleases the City rests.

The Court: The hour being what it is what would be the pleasure of counsel?

Mr. Adams: I have a motion to file with the Court. I would like to let the City Attorney look at this because I do not have copies and then I will file it with the Court.

Judge, this is a motion to exclude the evidence against these two defendants Gober and Davis on the ground that the City has not made out a case against them under the ordinance of the City of Birmingham for that the evidence indicates clearly that these people, these defendants were on the premises of Pizitz, that they were peacefully sitting at the so-called white lunch counter, and that the laws of the United States and Constitution do not forbid people to peacefully assemble and demonstrate to gain their rights; that the defendants were customers of Pizitz, that they had a right to enjoy the facilities of Pizitz on an equal basis with white persons; that there was no disorderly conduct involved here.

Furtherinore, looking at the face of the Statute itself there can be no violation of this Statute because on the face of the Statute it allows a person to be guilty thereof by the warning of any individual. It doesn't specify that the warning has to come from the owner or his agents operating the store. To be guilty of a criminal violation of Section 1436 of the General City Code of Birmingham [fol. 41] merely upon the warning of anybody to move or to leave certainly is the height of unconstitutionality and there is no basis upon which to figure any charge of that nature.

The contention of the defendants in this case is simply that they were rightfully on the premises, that it was a public place, Pizitz, and that they went there asking for services which Pizitz did afford to members of the public, and that the only reason they were told to leave was because of their color, and that therefore the defendants could not be guilty of violation of the City Statute, trespass after warning, for the Constitutional grounds as well as for the inadequacy of the City Ordinance itself.

Furthermore, there is no showing in this case, Your Honor, that there was any warning by any official of Pizitz Store, in his official capacity to do the particular thing it is claimed that they did do. So, therefore, we contend that there could not be a violation of the City Ordinance which is unconstitutional on its face and it is unconstitutional in its application and therefore these defendants should be discharged.

The Court: I overrule the motion to exclude the evidence.

Mr. Shores: We except, Your Honor.

James Albert Davis, called as a witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Adams:

Q. State your name and address?

A. James Albert Davis, 208 West Court, Birmingham, Alabama.

Q. What is your race?

A. Negro.

Q. Negro?

A. Yes, sir.

Q. Did you on March 31, have occasion to visit a department store in the City of Birmingham?

A. Yes, I did.

Q. What was the name of the said store?

[fol. 42] A. Pizitz.

Q. What was the nature of your business?

A. I went to shop.

Q. Did you shop?

A. Yes, I did.

Q. What did you purchase?

A. Socks and toothpaste, handkerchief.

Q. Socks and toothpaste and a handkerchief?

A. Yes, sir.

Q. At this time did you make other purchases or attempt to make other purchases in Pizitz Department Store?

A. I did attempt to make some. I attempted to go up and eat.

Q. You attempted to go up and eat?

A. That is right.

Q. Where did you go?

A. I went up on the mezzanine.

Q. Did you see any signs that said, "White and Colored?"

A. No, I didn't.

Q. When you reached the mezzanine what did you do?

A. I sat down.

Q. Were there other people sitting at this time?

A. Yes, there were.

Q. What was the race of the other people?

A. They were white.

Q. White?

A. That is right.

Q. Did you attempt to order or did you order?

A. We attempted to but we didn't.

Q. Why didn't you?

A. Well the waitresses they would not come over to us so we could order anything.

Q. Did anybody ever come over where you were sitting?

A. One man came over, yes.

[fol. 43] Q. Did he identify himself?

A. No, he didn't.

Q. He didn't identify himself at all?

A. No, he didn't.

Q. Did he tell you his capacity, his position?

A. No, he didn't tell us anything.

Q. He didn't tell you anything?

A. Nothing about his position.

Q. What did he say?

A. He told us that there was a place where Negroes could be served.

Q. That there was a place where Negroes could be served?

A. That is right.

Q. And this was at Pizitz?

A. That is right.

Q. Did he say whereabouts?

A. No, he didn't.

Q. Just downstairs?

A. Downstairs.

Q. In the same store your were at that time?

A. In the same store we were at that time, yes, sir.

Q. Let me ask you a question. You said he didn't identify himself?

A. No, he didn't.

Q. Did he ask you to leave the store?

A. No, he didn't ask me to leave the store.

Q. Did he ask you to leave where you were sitting?

A. No, he didn't ask me to leave where I was sitting. He just said they had a place downstairs where they would serve me.

Mr. Adams: That is all.

Cross examination.

By Mr. Davis:

Q. Did you ask the man that asked you to go elsewhere what his identity was or what his position with the company was?

[fol. 44] A. No, I didn't.

Q. You didn't bother to do that?

A. No, I didn't.

Q. Who told you to go to Pizitz?

A. Didn't anyone tell me to go.

Q. Well to whom did you report that you were willing and would volunteer to go to Pizitz?

A. I didn't tell anybody. I usually go to their establishment so I just figured I would go there that day for the same thing.

Q. You had a meeting and you discussed this with some—

Mr. Hall: We object to this cross-examination. It is outside of the issues brought out on direct. It has no bearing on what this witness has testified to or the issues involved in the case.

The Court: In the light of the officer's testimony about what the conversation was I think it is competent.

Mr. Hall: We take an exception.

Q. Did you have a meeting on March 30, wherein this trip and this visit was discussed?

A. Well I wouldn't exactly call it a meeting.

Q. I didn't ask you what you would call it. I said did you have a meeting?

A. No, we didn't have a meeting, no meeting.

Q. You didn't talk to anybody on that occasion in a group?

A. We talked to somebody on the occasion but it was not a meeting. We went there to be advised.

Q. How many were there in the group?

A. Well I don't exactly know.

Q. I didn't ask you exactly how many were there, but you know the names of everybody present, don't you?

A. I don't know exactly.

Mr. Hall: We object to the questions and the manner in which they are asked.

The Court: He says he doesn't know exactly how many were there.

[fol. 45] Q. Well, you recall Reverend Billups was there?

A. Yes, sir, I do.

Q. You know you were there and you know James Gober was there?

A. That is right.

Q. You know Roy Hutchison was there?

A. That is right.

Q. You know R. J. King was there?

A. Yes, sir.

Q. You know Robert L. Parker, Jr., was there?

A. Yes, sir.

Q. You know R. D. Sanders was there?

A. That is right.

Q. You know Reverend Shuttlesworth was there?

A. That is right.

Q. You know Jesse Walker was there?

A. I don't know him.

Q. You know William West was there?

A. William West, yes.

Q. You know there was a boy you didn't know from another college, Miles College?

A. Yes.

Q. You know Roosevelt Westmoreland was there?

A. Yes.

Q. You know W. J. Willis was there?

A. That is right.

Q. You know Reverend Shuttlesworth's wife was there?

A. I didn't see her.

Q. Did you all sit around and drink tea or did you have a discussion there of something you purported to do on the following day?

A. No, we talked about the demonstrations that had been going around the country. We went there to ask for advice.

Q. You went there voluntarily?

A. That is right.

Q. Nobody solicited you to come there?

[fol. 46] A. That is right.

Q. Nobody came to Daniel Payne College and asked for volunteers to go to the meeting?

A. That is right.

Q. How did you know about the meeting?

A. We went there for advice. We went to his home.

Q. Who did you go there with?

A. Reverend Billups was on the campus and I asked him to take us over there if he was going to town and he did so.

Q. Who else went with you?

A. I don't exactly remember who was in the car with me at that time.

Q. How many were in the car?

A. There was six.

Q. Six of you?

A. That is right.

Q. How did you decide to go to Reverend Shuttlesworth's house?

A. Well I have known Reverend Shuttlesworth, he is a pretty outstanding man in the City I think and I figured he should know something about it.

Q. He was waiting for you when you got there?

A. Well I wouldn't say waiting.

Q. Well he was at home?

A. He was at home, yes.

Q. All of you got together and you sat down and discussed the thing and there were others present for the discussion?

A. Well I wouldn't know about that.

Q. You heard the conversation?

A. I said I didn't know what they were there for.

Q. Did they talk about anything else except sit-ins while you were there?

A. Yes, we discussed things besides sit-ins, yes.

Q. What else?

A. About the schools and different things, different guys talking about football teams and different things.

[fol. 47] Mr. Hall: If Your Honor pleases, for the record I would like to again object. It seems that the City is more interested in the meeting and Reverend Shuttlesworth and Mrs. Shuttlesworth and Reverend Billups. I was under the impression that we are here representing defendants for trespassing on property after warning. This has no materiality at all.

Mr. Davis: For the sake of the record I would like to say for impeachment purposes this witness said they didn't have a meeting and I am trying to find out whether it was one or not.

Mr. Hall: Whether or not the City Attorney's definition of a meeting is the same as the witness' definition is immaterial. The witness said he didn't call it a meeting. But assume it was, what has that got to do with whether or not he is guilty of trespass after warning. That is all he is tried for.

The Court: Leave the record as it is.

Mr. Hall: We take an exception on the basis of the 14th Amendment.

Q. You say you purchased some items at Pizitz, socks, handkerchiefs and what else?

A. Toothpaste.

Q. Was that discussed at the gathering you had the prior day that you boys were to make certain purchases other than the purchase at the lunch counter?

A. It was not.

Q. It was not discussed?

A. No.

Q. You didn't hear anybody ask Reverend Shuttlesworth if they were supposed to buy anything else?

A. No, sir.

Q. You didn't tell Officer Pierce that that is what you were told to do?

Mr. Hall: If Your Honor pleases, we object to this question. What has that got to do with it?

Mr. Davis: If we had a little time I wouldn't mind telling counsel.

[fol. 48] Mr. Hall: If you are going to try him for trespass after warning I think you should hold the issues within that charge.

The Court: Well is there anything before the Court.

Mr. Hall: We object to the last question as to who told him to buy the toothpaste.

The Court: Leave it in.

Mr. Hall: We except.

Q. You know that we have perjury laws in Alabama, do you not?

A. Sure.

Q. I see. And you say that no one suggested or told you to buy any other articles than food.

A. No.

Q. Now you don't remember the topics they discussed, you don't remember at this time?

A. Like I said, I don't remember.

Q. You just don't have any recollection on the subject whatever it is, do you?

A. (No response)

Q. Did you go to the basement to buy food?

A. No, I didn't.

Q. What was this to be breakfast or lunch?

A. Well I would call it a snack.

Q. A snack?

A. That is right.

Mr. Davis: That is all.

Redirect examination.

By Mr. Adams:

Q. Have you ever seen the lunchroom, the lunch counter for Negroes in Pizitz Basement?

A. No, I haven't.

Q. Have you shopped in Pizitz Basement?

A. I was shopping on the first floor.

Q. Was Gober with you on this occasion?

A. Yes, he was.

Q. Did he buy any articles in the store?

[fol. 49] A. Yes, he did.

Q. Do you recall what he bought?

A. Well I think he bought some socks or something. I don't know exactly.

Q. Is the lunch counter on the mezzanine clearly visible from Pizitz first floor?

A. Yes, it is.

Q. You could see the persons there eating?

A. Yes, sir.

Q. Did you see a sign saying whether or not it was a white or colored lunch counter?

A. No.

Q. But there is a sign saying lunch counter or something to that effect?

A. That is right.

Mr. Adams: That is our case, Your Honor.

Mr. Davis: We have nothing further.

The Court: Does counsel care to argue the case?

Mr. Hall: Yes, sir.

The Court: All right, at two o'clock.

[fol. 50] TRANSCRIPT OF SENTENCING

The Court: May I ask if James Albert Davis is present?

A Voice: Yes.

The Court: James Gober. Roy Hutchinson. Robert J. King. Robert L. Parker, Jr. Robert D. Sanders. Jessie Walker.

A Voice: Here.

The Court: William West,

A Voice: Here.

The Court: Roosevelt Westmoreland and Willie J. Willis. Anyone whose name I didn't call among the students? Charles Billups.

A Voice: Here.

The Court: F. L. Shuttlesworth.

A Voice: Here.

The Court: Taking the Charge of Trespass After Warning as applied to each of the names just called, there was a slight change in the previous sentence. The Court finds the defendant and each of those called, finds the defendant guilty as charged in the complaint and fixes the punishment and fine at $100.00 and 30 days hard labor for the City. I have indicated that appeal bond will probably be filed.

Mr. Shores: Yes sir. But, Your Honor, before these appeal bonds are filed we would like for you to suspend the sentence to give us a chance to file a motion for a new trial and continue them under the same bond.

The Court: What do you say to that, Mr. Walker?

Mr. Walker: I have no objection to it. In other words, he has a right to file a motion for new trial. I have no objection to it. In other words, if they want to be free on the same bond and if that is agreeable to the Court, it is agreeable with me.

The Court: Mr. Davis, a motion was just made in each of the Trespass After Warning cases that—if you will, restate the motion, please.

Mr. Shores: That the sentence in each case be suspended and the defendants be continued under the same bond until we file and have a motion for a new trial determined.

Mr. Davis: Judge, I think we prefer things to go in their normal course.

[fol. 50a] The Court: If there is to be appeal bonds in each case, I do not see how any hardship or prejudice would result from letting it be done forthwith.

Mr. Shores: Well, Your Honor, we are in a position to file it forthwith, but, as Counsel knows, these are quasi-criminal cases and to file an appeal bond now this Court would really lose jurisdiction, and if His Honor doesn't

see fit to suspend the sentence, we would beg permission to file a motion for a new trial and let the motion be entered as filed and Your Honor can enter his ruling and give us a chance to file the motions within the next day or two and we will perfect the appeals today.

The Court: Would you mind giving the Court the benefit of your thought about any advantage or any favorable result or any profit to the defendants by doing that?

Mr. Shores: In a motion for a new trial we feel we would re-raise several points that were not really raised during the trial and indicate them as error in this motion for a new trial. In other words, if Your Honor would entertain them, we would make a motion for a new trial at this time and beg leave of the Court for time to specify the grounds for a new trial and let the record show that the motion for a new trial was filed immediately after the sentence and that the bond would be filed after—let it be shown the bond is filed after the motion for a new trial is ruled upon.

Mr. Adams: Judge, I think one of the thoughts in mind here is it is almost axiomatic for lawyers that a motion for a new trial should be filed after the sentence of the defendant, and it might be considered negligence if such a motion were not filed regardless of what the Court's decision may be on it. And we also are in this position in these cases. It is my understanding that the motion for new trial does not necessarily suspend the running of time in which the record must be on file with the Court of Appeals, and, therefore, in order to save the time in which we have to perfect the appeal and not let the time [fol. 51] just passing when the motion is before Your Honor consume the time we have to file our record on appeal; we are asking that the motion be allowed to be filed before we file the notice of appeal, and if the Court rules against us on the motion we will file immediately our appeal.

Now, in the event that the Court sees fit to want to dispose of the thing immediately, we would like to file now a motion orally after sentencing, which has been done, sentence has been given, we would file our motion orally and subsequently put it in writing, and the Judge may rule, if he is so disposed, now, as to how he feels about it. But we

think, as officers of the Court and lawyers, that a motion for a new trial certainly is consistent with good practice and may be considered error on the part of Counsel if such were not filed. That is our thought about it.

The Court: All right. You want the execution of sentence held in abeyance until such time as your motion for new trials can be formally presented?

Mr. Shores: That is our motion, Your Honor.

The Court: Would there be anything—would there by any advantage to the defendants to put that motion in writing formally?

Mr. Shores: We would have to designate, and it would take some time to spell out the various grounds that we feel on which we are entitled to a new hearing or a new trial. We could have it done by Monday.

The Court: I won't be here Monday.

Mr. Shores: Well, the following Monday or any date Your Honor sees fit. As I say, it is not going to jeopardize the City to grant this little stay.

The Court: If there is any good or any advantage to be had, the Court wants it had. I just didn't see how there was to be any. Now, suppose we do it this way, then. As I understand the law, I can suspend the judgment of sentence for 24 hours, and I am doubtful about being able to do it longer in City appeal cases. Would this time tomorrow be too soon?

It seems to be that you have here the ten students and the Court thinks they were misused and misled into a violation of a City Ordinance and has so ruled. Now, if [fol. 51a] there would be any stronger position before the Court of Appeals to have also a denied motion for a new trial, I would want them to have that.

Mr. Shores: We feel they would, Your Honor. Could Your Honor do this? As indicated, we have made our motion for a new trial and would Your Honor give us leave—I mean you can rule on the motion and deny the motion now and give us leave to put it in writing for the record?

The Court: Sure.

Mr. Shores: Then we would immediately make our appeal bonds and the sequence of the record would show a motion

for a new trial, the motion overruled, and the appeal perfected.

The Court: What says the City?

Mr. Davis: I am not sure I see what he is trying to accomplish other than the fact he would like to clutter this record further; but I would prefer not to yield on any point on this thing. Of course, they are entitled to file their motion. I have no objection to giving them several days to file their motion, but other than that, I wouldn't want to be agreeable to any extensions or waivers as to bonds or things of that description.

Mr. Shores: We will file the bond today. We are asking we be permitted to spell out the oral motion we have already made.

The Court: After your appeal bond is filed?

Mr. Shores: That's right.

The Court: I think that is all right.

Well, it was the same judgment and sentence in each of the student cases.

That brings us, I believe, to three other cases, the case of Charles Billups charged with aiding and abetting. The Court finds the defendant guilty as charged in the complaint and fixes his punishment and fine in the sum of $25.00 and 30 days hard labor for the City of Birmingham.

In the case of F. L. Shuttlesworth, charged with aiding and abetting, the Court finds the defendant guilty as charged [fol. 52] in the complaint and fixes his punishment at a fine in the sum of $100.00 and 180 days hard labor for the City.

The case of F. L. Shuttlesworth, charged with false information, the defendant moved for a dismissal and the motion was granted.

Mr. Shores: Your Honor, as to those last two cases we would like to move orally for a motion for a new trial with leave to file written motion within a reasonable time.

The Court: With the appeal bonds forthwith made?

Mr. Shores: That's right.

The Court: All right.

Mr. Shores: How long will Your Honor give us to write those motions up since the bonds will have already been filed? May we have a couple weeks?

The Court: Well, haven't we conscientiously canvassed the issues?

Mr. Shores: We have.

The Court: Is there anything to be gained by thrashing the straw again?

Mr. Shores: We would just like to have it ruled on. Let the record show that the motion is denied.

The Court: All right, so ordered.

Mr. Shores: Then, we will make note of an appeal in each case separately and severally and will forthwith file the appeal bond. What will that bond be, Your Honor?

The Court: $300.00 I believe is mentioned in each case.

The foregoing was all the testimony and oral proceedings.

COUNSEL'S NOTE RE RECORD

The transcript of the sentencing of the petitioners as printed in the *Gober* record appears in identical form in each of the 10 cases.

[fol. 53] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 54]

THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

The State of Alabama,
Jefferson County.

CLERK'S CERTIFICATE

I, Julian Swift, Clerk of the Circuit Court of the Tenth Judical Circuit of Alabama, in and for said County and State, do hereby certify that the foregoing pages, numbered from 1 through 12 both inclusive, contain a full, true and complete transcript of the records and proceedings in this Court (except such parts as are not necessary to be contained therein); that pages numbered from 13 through 53 both inclusive, contain a transcript of evidence together with all proceedings therein as filed in this office, all being in a cause wherein the City of Birmingham is plaintiff, and James Gober is defendant, which said cause

was tried and determined in this Court on the 11th day of October, 1960, and an appeal was taken from the judgment therein to the Court of Appeals of Alabama. Defendants gave bond to answer said appeal.

Witness my hand and the seal of this Court, this the 27th day of January, 1961.

Julian Swift, Clerk of the Circuit Court of the Tenth Judicial Circuit of Alabama.

[fol. 55]

IN THE COURT OF APPEALS OF ALABAMA

JAMES GOBER, Appellant,

vs.

THE CITY OF BIRMINGHAM, Appellee.

ASSIGNMENT OF ERRORS

The Appellant says that there is manifest error in the foregoing Transcript of the Record of the proceedings, had and done in the Honorable Circuit Court of Jefferson County, Alabama, to the hurt and prejudice of this appellant, and for error assigns each of the following separately and severally:

1. The Court erred in overruling Appellant's Motion to Strike the Complaint in this cause, to which ruling Appellant took exception. (Tr. 2, 3, 8 & 16)

2. The Court erred in overruling Defendant's Demurrers filed in this cause, to which ruling appellant took exception. (Tr. 3, 4, 8 & 16)

3. The Court erred in overruling Appellant's Motion to Exclude the Evidence. (Tr. 5, 7, 8, 41 & 42)

4. The Court erred in overruling Appellant's Motion for a New Trial. (Tr. 9, 10, 12 & 55).

5. The Court erred in allowing Detective C. L. Pierce to testify relative to an alleged conversation had on April 1, with James Edward Gober and James Albert Davis,

with reference to certain admissions of Appellant, in the nature of confession, over Appellant's objections, to which ruling Appellant took exception. (Tr. 37)

Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, Jr., J. Richmond Pearson, Attorneys for Appellant.

[fol. 56] Certificate of Service (omitted in printing).

[fol. 57]

IN THE COURT OF APPEALS OF THE STATE OF ALABAMA

JUDICIAL DEPARTMENT

October Term, 1960-61

6 Div. 797

JAMES GOBER,

v.

CITY OF BIRMINGHAM.

Appeal from Jefferson Circuit Court

November 2, 1960
Certificate Filed

January 30, 1961
Transcript Filed

April 18, 1961

Come the parties by attorneys, and argue and submit this cause for decision.

ORDER OF AFFIRMANCE—May 30, 1961

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that

the judgment of the Circuit Court be in all things affirmed. It is also considered that the appellant pay the costs of appeal of this court and of the Circuit Court.

[fol. 58]

IN THE COURT OF APPEALS OF THE STATE OF ALABAMA

..... JUDICIAL DEPARTMENT

October Term, 1960-61

6 Div. 797

JAMES GOBER,

v.

CITY OF BIRMINGHAM.

Appeal from Jefferson Circuit Court

OPINION—May 30, 1961

HARWOOD, Presiding Judge

This appellant was first convicted in the Recorder's Court of the City of Birmingham for violating Section 1436 of the City Code of Birmingham, Alabama, 1944.

Section 1436, supra, is as follows:

> "Sec. 1436, *After Warning.* Any person who enters into the dwelling house, or goes or remains on the premises of another, after being warned not to do so, shall, on conviction, be punished as provided in Section 4; provided, that this Section shall not apply to police officers in the discharge of official duties."

[fol. 59] On his conviction in the Recorder's Court, the appellant perfected an appeal to the Circuit Court of Jefferson County, where he was again adjudged guilty, and punishment was imposed.

The complaint filed in the Circuit Court reads:

> "Comes the City of Birmingham, Alabama, a municipal corporation, and complains that James Gober,

"within twelve months before the beginning of this prosecution and within the City of Birmingham or the police jurisdiction thereof, did go or remain on the premises of another, said premises being the area used for eating, drinking, and dining purposes and located within the building commonly and customarily known as Pizitz Department Store, located at 1821 2nd Avenue, North, Birmingham, Alabama, after being warned not to do so, contrary to and in violation of Section 1436 of the General City Code of Birmingham of 1944."

The evidence presented by the City in the trial below tends to show that this appellant, together with one James Davis, went to the cafeteria or lunch room in the Pizitz store and seated themselves at a table. According to the appellant, they could not obtain service from the waitresses. Shortly, Dick Pizitz, assistant to the President of Pizitz, arrived and asked the appellant and Davis to leave, and told them they could be served downstairs. The appellant and Davis refused to leave. Either the appellant or Davis, upon refusing to leave, suggested that the police be called.

In response to instructions from a superior officer, a police officer of the City of Birmingham went to the restaurant. He found the appellant and Davis still seated at a table, and placed both under arrest.

This being an appeal from a conviction for violating a city ordinance, it is quasi criminal in nature, and subject to rules governing civil appeals. Accordingly we will limit our review to errors assigned and argued in appellant's brief. *Fiorella* v. *City of Birmingham*, 35 Ala. App. 384, 48 So. 2d 761; cert. den. 254 Ala. 515, 48 So. 2d 768; cert. den. 71 S. Ct. 506, 340 U.S. 942, 95 L. Ed. 680; *Ellis* v. *City of Sylacauga*, 36 Ala. App. 687, 63 So. 2d 33; *Parks* v. *City of Montgomery*, 38 Ala. App. 681, 92 So. 2d 683.

[fol. 60] In the proceedings below the appellant filed a motion to strike the complaint, which motion was overruled. This ruling is asserted as error in Assignment of Error No. 1.

A motion to strike is not the proper method of testing the sufficiency of a complaint. *Taylor* v. *City of Birmingham*, 35 Ala. App. 133, 45 So. 2d 53; *Byrum* v. *Pharo*, 240 Ala. 564, 200 So. 622. Assignment of Error No. 1 is therefore without merit.

Appellant's Assignment of Error No. 2 avers that the court erred in overruling his demurrer to the complaint.

Ground 1 of the demurrer asserts that the complaint does not charge the defendant with any offense under the laws or Constitution of the State of Alabama; Ground 2, that the complaint is insufficient to support a prosecution in that no offense is charged corrigible by the Court; Ground 3, that the complaint is so vague and uncertain as to not apprise the defendant of what he is called upon to defend.

Pretermitting other possible defects, it is clear that all of the grounds are general in nature, and in no wise point out any specific defect in the complaint.

For this reason alone the lower court was justified in refusing to examine the complaint for defects therein, and could properly overrule the demurrer, *Oliveri* v. *State*, 13 Ala. App. 348, 69 So. 357, and a trial court will not be put in error for overruling a demurrer based on general grounds which are not sufficiently specific to point out an alleged defect in the pleading. *Cabiness* v. *City of Tuscaloosa*, 39 Ala. App. 538, 104 So. 778; *Barber* v. *Hollon*, 265 Ala. 323, 91 So. 2d 229.

In brief counsel for appellant argues that the complaint is insufficient in not setting forth by whom the appellant was warned to leave the premises.

No ground of the demurrer raised this point in the court below. Even if the complaint be defective in this regard, a premise we do not accept, the defect was amendable. Sec. 238, Tit. 7, Code of Alabama 1940, provides:

[fol. 61] "Either before or after judgment on demurrer, the court must permit an amendment of the pleadings; • • •"

This section is broad and comprehends all pleadings except indictments, and authorizes amendment of complaints

in prosecutions for violation of city ordinances, as though it were a complaint in a civil action. *Thomas* v. *State*, 58 Ala. 365.

The alleged defect not having been in any wise raised in the court below, and not pointed out by demurrer, is not available on appeal, and will not be considered. *McElhaney* v. *Singleton*, 270 Ala. 162, 117 So. 2d 375; *Campbell* v. *Jackson*, 257 Ala. 618, 60 So. 2d 252.

Grounds 4, 5, 6, 7 and 8 assert the invalidity of the ordinance (Sec. 1436, supra) on various constitutional grounds, *as applied to this defendant*. (Italics ours.) No unconstitutional application of the ordinance to this defendant appears from any of the pleading. Such unconstitutional application would be a matter of evidence. These grounds, setting up a speaking demurrer, necessitated an overruling of the demurrer in this aspect. *Brown* v. *City of Fairhope*, 265 Ala. 596, 93 So. 2d 419; *Kalas* v. *McMahon*, 36 Ala. App. 238, 54 So. 2d 322; *United States Fidelity and Guaranty Co.* v. *Town of Dothan*, 174 Ala. 480, 56 So. 953.

Appellant's Assignments of Error numbers 3 and 4, respectively, are to the effect that the lower court erred in overruling appellant's motion to exclude the evidence, and in overruling appellant's motion for a new trial. Counsel has made no attempt to separate these assignments for argument in brief, and we will treat them jointly, though we wish to observe that the grounds supporting the motion to exclude the evidence are faulty in several aspects, particularly in setting forth erroneous legal principles as their bases. All grounds specified in support of the motion were defective, and the court properly overruled the motion.

Counsel has argued among other matters, various phases of constitutional law, particularly as affected by the [fol. 62] Fourteenth Amendment of the Federal Constitution, such as freedom of speech, in regard to which counsel state: "What has become known as a 'sit-in' is a different, but well understood symbol, meaningful method of communication." Counsel has also referred to cases pertaining to restrictive covenants. We consider such principles entirely inapplicable to the present case.

Counsel also stated in brief that " * * * The prosecution adduced no evidence to prove that they had no such constitutional right * * * " that is, to remain in the restaurant after having been requested to leave. In this, counsel are under a misapprehension as to the burden to be carried by the defense. The City having presented evidence tending to show that the appellant remained upon private premises after having been warned by an officer of the company owner to leave, it was under no burden to go further and offer evidence that the appellant's act was done without lawful excuse. This was defensive matter, the proof of which rested upon the appellant unless the evidence which proved the act also proved the excuse. *Owens* v. *State*, 74 Ala. 401.

As we interpret the argument of counsel for appellant, its tenor may well be illustrated by the following quotations from the brief:

> "Due process and equal protection demand that a Negro be accorded the right to sit at eating counters of privately owned businesses, if he has been a customer in other departments of the store.
>
> * * * * * * *
>
> "That the premises were privately owned should not detract from the high constitutional position which such free expression deserves."

We know of no warrant in law validating the principles asserted by counsel.

As aptly stated in *Browder* v. *Gayle*, 142 F. Supp. 707:

> "In their private affairs, in the conduct of their private businesses, it is clear that the people themselves have the liberty to select their own associates and the persons with whom they will do business, unimpaired by the Fourteenth Amendment. The Civil Rights cases, 109 U.S. 33 S. Ct. 18, 27 L. Ed. 835. Indeed we think that such liberty is guaranteed by the due process of that Amendment."

[fol. 63] Even so, there is no question presented in the record before us, by the pleading, of any statute or ordinance requiring the separation of the races in restaurants. The prosecution was for a criminal trespass on private property.

The Pizitz Department Store is a private business—a private enterprise. It has no connection with any governmental agency, federal, State, County or city.

The appellant entered upon the privately owned and operated premises of the store as a licensee by implied invitation. He had no interest in the premises. While a distinction exists between a licensee and an invitee in so far as liability for negligence on the part of the owner of the premises is concerned, the principles governing appellant's conduct in the present consideration must be governed by the rules pertaining to licensees, for in general, that is the position he occupied even though on the premises by an implied invitation.

The Pizitz store, being the owner of its premises, had a full right to limit the use of its own premises as it saw fit.

By its own choice it could limit the use of any part of its premises. It exercised this right to limit the use of its restaurant.

In the absence of statute, a restaurant owner may accept or reject customers on purely personal choice. *Nance* v. *Mayflower Tavern*, 106 Utah 517, 150 P. 2d 773; *Noble* v. *Higgins*, 158 N. Y. S. 867, 95 Misc. 328.

The right to operate a restaurant on its own premises under such conditions as it saw fit to impose was an inalienable property right possessed by the Pizitz store. The appellant would destroy this property right by attempting to misapply the Fourteenth Amendment, ignoring the provision in that Amendment that grants the right to a private property owner to the full use of his property, that is: "Nor shall any state deprive any person of life, *liberty, or property*, without due process of law." (Italics ours.) [fol. 64] As stated in *Williams* v. *Howard Johnson Restaurant*, (C.C.A. 4) 368 Fed. 2d 845, there is an "important distinction between activities that are required by the State and those which are carried out by voluntary choice and

without compulsion by the people of the State in accordance with their own desires and social practices."

It is fundamental, and requires no citation of authority, that the grantor of a license, which has not become coupled with an interest, may revoke the license at will.

When the appellant was requested to leave the restaurant by an official of the Pizitz store, and refused to leave, his status as an invited licensee was destroyed, and he was thereafter on the premises as a trespasser. As stated in *Martin* v. *City of Struthers*, 319 U. S. 147, 63 S. Ct. 862, 87 L. Ed. 1313:

> "Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off."

Boynton v. *Virginia*, 81 S. Ct. 182, relied on by the appellant, was decided on the basis of the Federal Interstate Commerce Act, and is to the effect that said act prohibits the exclusion of Negroes from restaurants operated or controlled by an interstate carrier as a part of its business. This doctrine cannot be said to create a constitutional right to trespass on private property, regardless of race.

Likewise, we find the doctrine of *Marsh* v. *State of Alabama*, 326 U. S. 501, 90 L. Ed. 265, inapplicable to the present case. The Marsh case, supra, concerned the right to distribute religious pamphlets on the sidewalk of a company owned town. As stated by the court, this town though owned by a company, had "all the characteristics of any other American town" in so far as municipal functions were concerned, and therefore should be subjected to constitutional limitations imposed on regular public municipalities. Here we are concerned with a private owner in the use of his private property.

We find no merit in appellant's Assignments numbers 3 and 4.

[fol. 65] Assignment of Error number 5 relates to a ruling concerning the admission of certain evidence. Counsel has not argued this assignment in brief, and pretermit consideration thereof.

Affirmed.

[fol. 66]

IN THE COURT OF APPEALS OF THE STATE OF ALABAMA

..... JUDICIAL DEPARTMENT

October Term, 1960-61

6 Div. 797

JAMES GOBER,

v.

CITY OF BIRMINGHAM,

Appeal from Jefferson Circuit Court

APPLICATION FOR REHEARING—June 14, 1961

Now comes appellant, in the above styled cause, and respectfully moves this Honorable Court to grant Appellant a rehearing in said cause, and to reverse, revise and hold for naught its Judgment rendered on, to-wit, the 30th day of May, 1961, and affirming the Judgment of the Circuit Court of Jefferson County, Alabama, and to enter an Order, reversing said Judgment.

Arthur D. Shores, Orzell Billingsley, Jr., Peter A. Hall, Oscar W. Adams, Jr., J. Richmond Pearson, Attorneys for Appellant.

ORDER OVERRULING APPLICATION FOR REHEARING —June 20, 1961

It is ordered that the application for rehearing be and the same is hereby overruled. Per Curiam.

COUNSEL'S NOTE RE RECORD

The application for rehearing in the Alabama Court of Appeals and that Court's order overruling the application in the *Gober* record, is identical to the similar applications and orders filed in the other 9 cases except for the captions.

[fol. 67] [File endorsement omitted]

No. 762 Sixth Division

Ex Parte: James Gober

IN THE SUPREME COURT OF ALABAMA

JAMES GOBER, Appellant,

vs.

CITY OF BIRMINGHAM, Appellee.

PETITION FOR CERTIORARI—Filed July 3, 1961

[fol. 68] *To the Honorable Chief Justice and Associate Justices of the Supreme Court of Alabama*

1. Comes the Appellant, by and through his Attorneys, Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, Jr., and J. Richmond Pearson, and respectfully petitions this Honorable Court to review, revise, reverse and hold for naught that certain Judgment of the Court of Appeals, on to-wit: May 30, 1961, wherein James Gober was Appellant and the City of Birmingham was Appellee, which Judgment affirms the Judgment of the Circuit Court of Jefferson County, Alabama.

2. Your petitioner avers that application to the Court of Appeals for a Rehearing of said cause and Brief in support thereof were duly filed by your petitioner within the time required by law, and that said application for rehearing was overruled by said Court of Appeals on the 20th day of June, 1961.

3. Your petitioner respectfully shows unto the Court that this cause arose from a complaint filed by the City of Birmingham, charging your petitioner with violating 1436 of the General City Code of Birmingham, viz:

> "Any person who enters into the dwelling house or goes or remains on the premises of another, after being warned not to do so, shall on conviction, be

punished as provided in §4, provided that this Section shall not apply to police officers in discharge of official duties."

4. Your petitioner filed a Motion to Quash the Complaint and Demurrers to the Complaint, on grounds that the Complaint was so vague and indefinite as not to apprise the Appellant of what he was called upon to defend, and further, that the ordinance which formed the basis of the [fol. 69] prosecution, as applied to appellant, constituted an abridgement of the privileges and immunities guaranteed by the Constitution of the United States and that the ordinance was unconstitutional on its face.

5. The Court overruled the Motion to Quash and the Demurrers whereupon petitioner was tried without a jury, and was found guilty of Trespass after Warning, and fined One Hundred ($100.00) Dollars and costs, and sentenced to a term of Thirty (30) Days of hard labor for the City of Birmingham.

6. Your petitioner filed a Motion to Exclude the Evidence, at the close of the City's case, which Motion was denied. After judgment and sentence, petitioner filed a Motion for a New Trial, which Motion was denied, and petitioner perfected his appeal.

7. Your petitioner further shows unto Your Honors that the Court of Appeals erred in affirming and failing to reverse said cause, in the following ways, to-wit: The Court based its judgment in this cause upon the opinion judgment rendered in the case of James Gober vs. City of Birmingham, Sixth Division—797, decided May 30, 1961.

8. That the Propositions of Law involved, which petitioner claims should be reviewed and revised by this Court, are as follows:

A. That the Ordinance and Complaint, the basis of the prosecution, are unconstitutional on their face, that they are so vague, indefinite and uncertain as to constitute a deprivation of liberty, without due process of law; in violation of the Fourteenth Amendment to the United States Constitution.

B. That the Ordinance and Complaint, the basis of the prosecution, as applied to petitioner, constitute an abridgement of the privileges and immunities, and a denial of the equal protection of the laws, all in violation of the Fourteenth Amendment to the United States Constitution.

The Court of Appeals erred in failing to rule that the conviction of petitioner was a violation of due process of law, an abridgement of the privileges and immunities of the petitioner, in that the petitioner was denied equal protection of the law, all in violation of the Fourteenth Amendment to the Constitution of the United States.

[fol. 70] Wherefore, Your petitioner most respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals of Alabama, commanding and requiring said Court to certify and send to this Court, on a day certain to be designated by this Court, a full and complete transcript of record, and all proceedings of said Court of Appeals of Alabama, in the Cause numbered and entitled aforesaid, to the end that this cause may be reviewed and determined by this Honorable Court as provided by law and the rules and practice of this Court, and that this Court thereupon proceed to review and correct the errors complained of and to reverse the Judgment of the Court of Appeals or render such Judgment as said Court should have rendered.

Petitioner prays that this Honorable Court suggest and require the Court of Appeals to Stay or recall its Certificate of Affirmance of said cause, during the pendency of this petition.

And petitioner prays for such other, further and additional relief in the premises, as to this Court may seem appropriate, and to which he may be entitled, and your petitioner will ever pray.

Respectfully submitted,

Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, Jr., J. Richmond Pearson,
By Oscar W. Adams, Jr., Attorneys for Appellant.

[fol. 71] *Duly sworn to by Oscar W. Adams, Jr., jurat omitted in printing.*

Certificate of Service (omitted in printing).

[fol. 72]

IN THE SUPREME COURT OF ALABAMA

The Court met in Special Session pursuant to adjournment

Present: All the Justices

6th Div. 762

Ex Parte: JAMES GOBER, Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

(Re: James Gober vs. City of Birmingham)

Jefferson Circuit Court

ORDER DENYING PETITION FOR WRIT OF CERTIORARI —September 14, 1961

Comes the Petitioner in the above styled cause and the Petition for Writ of Certiorari to the Court of Appeals being Submitted on Briefs and duly examined and understood by the Court,

It Is Ordered that the Writ of Certiorari be and the same is hereby denied and the petition dismissed at the cost of the petitioner for which cost let execution issue.

Livingston, C.J., Simpson, Goodwyn and Coleman, JJ., Concur.

COUNSEL'S NOTE RE RECORD

The order of the Supreme Court of Alabama denying the writ of certiorari in the *Gober* record is identical to those in the records pertaining to the other 9 petitioners except for the captions.

[fol. 73]

No. 762 Sixth Division

Ex Parte James Gober

In the Supreme Court of Alabama

James Gober, Appellant,

vs.

City of Birmingham, Appellee.

Application for Rehearing—Filed September 28, 1961

Now comes Appellant, in the above styled cause, and respectfully moves this Honorable Court to grant Appellant a Rehearing in said cause, and reverse, revise and hold for naught its Judgment rendered on to-wit, the 14th day of September, 1961, denying appellant the Writ of Certiorari and dismissing the petition, and to enter an Order reinstating appellant's petition, and directing that a Writ of Certiorari be issued out of and under the Seal of this Court, to the Court of Appeals of Alabama, to the end that this cause may be reviewed and determined by this Honorable Court.

Appellant further moves the Court to grant a Stay of Execution in this cause, during the pendency of this Application for a Rehearing.

Submitted herewith is a Brief and Argument, in support of said Motion.

Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, J. Richmond Pearson, Attorneys for Appellant, By Oscar W. Adams.

Counsel's Note Re Record

The application for rehearing of the denial of the writ of certiorari, printed in the *Gober* record, is identical to that appearing in the records pertaining to the other 9 petitioners except for the captions.

[fol. 74]

IN THE SUPREME COURT OF ALABAMA

The Court met pursuant to adjournment

Present: All the Justices

6th Div. 762

Ex Parte: JAMES GOBER, Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

(Re: James Gober vs. City of Birmingham)

Jefferson Circuit Court

ORDER OVERRULING APPLICATION FOR REHEARING

—November 2, 1961

It Is Hereby Ordered that the application for rehearing filed in the above cause by the petitioner on September 28, 1961, be and the same is hereby overruled.

(Livingston, C.J., Simpson and Coleman, JJ., concur.)

COUNSEL'S NOTE RE RECORD

The order of the Supreme Court of Alabama overruling the application for rehearing in the *Gober* record is identical to the corresponding orders in the records pertaining to the other 9 petitioners except for the captions.

[fol. 75] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 75a] [File endorsement omitted]

No. 762 Sixth Division

Ex Parte: James Gober

In the Supreme Court of Alabama

James Gober, Appellant,

vs.

City of Birmingham, Appellee.

Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., J. Richmond Pearson, Oscar W. Adams, Jr., Attorneys for Appellant.

Proceedings on Petition for Certiorari

July 3, 1961 Submitted on Briefs

September 14, 1961 Writ Denied: No Opinion

September 28, 1961 Application for Rehearing Filed

November 2, 1961 Application for Rehearing Overruled

Counsel's Note Re Record

The page in the *Gober* record which lists the proceedings in the Supreme Court of Alabama on the petition for certiorari and gives the dates of rulings, etc., is identical to the corresponding page in the records pertaining to the other 9 petitioners except for the captions.

[fol. 76] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 1]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA, IN AND FOR JEFFERSON COUNTY

No. 20779

THE CITY OF BIRMINGHAM,

vs.

JAMES ALBERT DAVIS

APPEAL BOND [omitted in printing].

[fol. 2]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20779

CITY OF BIRMINGHAM, a Municipal Corporation, Plaintiff,

vs.

JAMES ALBERT DAVIS, Defendant.

COMPLAINT—Filed October 10, 1960

Comes the City of Birmingham, Alabama, a municipal corporation, and complains that James Albert Davis, within twelve months before the beginning of this prosecution and within the City of Birmingham or the police jurisdiction thereof, did go or remain on the premises of another, said premises being the area used for eating, drinking, and dining purposes and located within the building commonly and customarily known as Pizitz Department Store, located at 1821 2nd Avenue, North, Birmingham, Alabama, after being warned not to do so, contrary to and in violation of

Section 1436 of the General City Code of Birmingham of 1944.

Watts E. Davis, Attorney for City of Birmingham.

[File endorsement omitted]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20779

CITY OF BIRMINGHAM,

vs.

JAMES ALBERT DAVIS.

MOTION TO STRIKE—Filed October 10, 1960

Comes now James Albert Davis, defendant in this cause, and moves to strike the complaint in this cause, and as grounds for said Motion; sets out and assigns the following, separately and severally:

1. That the complaint, affidavit, etc., is not sworn to.

2. That the allegations of the said complaint are so vague and indefinite, as not to apprise this defendant of what he is called upon to defend.

3. That the ordinance or statute upon which is founded the complaint in this cause, as applied to this defendant, as a citizen of the State of Alabama, and of the United States, constitutes an abridgment of the freedom of assem- [fol. 3] bly, speech and liberties secured to the Defendant, by the Constitution and laws of the State of Alabama and the Fourteenth Amendment of the Constitution of the United States of America.

4. That the said ordinance or statute which is the basis for the affidavit, information or complaint in this cause,

as applied to the defendant, constitutes an abridgment of privileges and immunities guaranteed defendant, as a citizen of the United States, in violation of the Constitution and laws of the State of Alabama, and of the Fourteenth Amendment of the United States Constitution.

5. That Section 824 of the General City Code of the City of Birmingham, as applied to this defendant, a Negro citizen of the United States, constitutes a denial of due process and equal protection of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

6. That the said affidavit, information or complaint, does not charge any offense, which is cognizable by this court.

Arthur D. Shores, J. Richmond Pearson, Orzell Billingsley, Jr., Peter A. Hall, Oscar W. Adams, Jr., Attorneys for Defendant.

[File endorsement omitted]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20779

CITY OF BIRMINGHAM,

vs.

JAMES ALBERT DAVIS.

DEMURRERS—Filed October 10, 1960

Comes now James Albert Davis, defendant in this cause, and demurs to the complaint in this cause, and to each and every count thereof, separately and severally, and as grounds for such demurrer sets out and assigns the following, separately and severally:

1. The affidavit or information which supports the complaint in this cause, does not charge defendant with any offense under the Constitution and laws of the State of Alabama.

2. That the complaint, affidavit or information upon which this cause is based is insufficient to support prosecution of this cause, in that no offense is charged which is [fol. 4] cognizable by this Honorable Court.

3. That the allegations of the complaint and each count thereof are so vague and indefinite as not to apprise this defendant of what he is called upon to defend.

4. That the ordinance, Section 1436 of the 1944 General City Code of Birmingham, Alabama, as applied to this defendant, is invalid in that it violates Section 4, Article 1, of the Constitution of Alabama, and the First and Fourteenth Amendments to the Constitution of the United States of America.

5. That Section 1436 of the 1944 General City Code of Birmingham, Alabama, which supports the complaint, affidavit or information in this cause, as applied to this defendant, a citizen of the State of Alabama and of the United States, constitutes an abridgment of freedom of speech and assembly violative of rights and liberties secured the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

6. That the aforesaid ordinance as applied to defendant, in (sic) unconstitutional on its face in that it is so vague as to constitute a deprivation of liberty without due process of law in violation of the provisions of the Fourteenth Amendment to the United States Constitution.

7. That the said Ordinance or Statute in this case, as applied to defendant, constitutes an abridgment of privileges and immunities guaranteed defendant as a citizen of the United States, in violation of the Fourteenth Amendment to the United States Constitution.

8. That the said Ordinance, as applied to defendant, constitutes a denial of equal protection of the laws in

violation of the Fourteenth Amendment to the Constitution of the United States of America.

Arthur D. Shores, Orzell Billingsley, Jr., J. Richmond Pearson, Peter A. Hall, Oscar W. Adams, Jr., Attorneys for Defendant.

[File endorsement omitted]

[fol. 5]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20779

CITY OF BIRMINGHAM, Plaintiff,

versus

JAMES ALBERT DAVIS, Defendant.

MOTION TO EXCLUDE THE EVIDENCE—Filed October 10, 1960

1. The complaint charging defendant, a Negro, with violation of 1436 of the General City Code of Birmingham of 1944, to-wit, an alleged trespass upon land after being forbidden to enter or remain after told to leave is invalid in that the evidence establishes merely that defendant was peacefully upon the premises of Pizitz eating facilities, an establishment performing an economic function invested with the public interest, as a customer, visitor, business guest or invitee, and there is no basis for the charge recited by the complaint other than an effort to exclude defendant from Pizitz eating facilities because of his race or color; defendant, at the same time is excluded from equal service at the preponderant number of other similar eating establishments in Birmingham, Alabama; thereby depriving him of liberty without due process of law and of the equal protection of the laws secured by the 14th Amendment of the United States Constitution.

2. The evidence offered against defendant, a Negro, in support of the complaint charging him with violation of trespass upon land after being forbidden to enter establishes that he was, at the time of arrest and at all times covered by the charge, in peaceful exercise of constitutional rights to assemble with others for the purpose of speaking and protesting against the practice, custom and usage of racial discrimination in Pizitz eating facilities, an establishment performing an economic function invested with the public interest; that defendant peacefully was attempting to obtain service in the facilities of Pizitz eating facilities in the manner of white persons similarly situated, and at no time was defendant defiant or in breach of the peace and was at all times upon an area essentially public, wherefore defendant has been denied rights secured by the due process and equal protection clauses of the 14th Amendment of the United States Constitution.

3. The evidence establishes that prosecution of defendant was procured for the purpose of preventing him from engaging in peaceful assembly with others for the purpose of speaking and otherwise peacefully protesting in public places the refusal of the preponderant number of stores, facilities and accommodations open to the public in Birmingham, Alabama to permit defendant, a Negro, and other [fol. 6] members of defendant's race from enjoying the access to such stores, facilities and accommodations afforded members of other races; and that by this prosecution, prosecuting witnesses and arresting officers are attempting to employ the aid of the Court to enforce a racially discriminatory policy contrary to the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States.

4. The evidence against defendant, a Negro, in support of the complaint charging him with violation of trespass upon land after being forbidden to enter clearly indicates that defendant at the time of his arrest, had accepted an invitation to enter and purchase articles in Pizitz's Eating Facilities; a store open to the public, but had not been allowed to obtain food service on the same basis as that offered white persons, because of defendant's race or color;

and, that in furtherance of this racially discriminatory practice of Pizitz eating facilities, defendant was arrested on the basis of race or color, under color of law, to enforce Pizitz's eating facilities racially discriminatory policy, thereby violating defendant's rights under the equal protection and due process clauses of the 14th Amendment of the United States Constitution.

5. The statute or ordinance (1436 of the General City Code of Birmingham of 1944) under which defendant, a Negro, was arrested and charged is unconstitutional on its face by making it a crime to be on public property after being asked to leave by an individual at such individual's whim, in that said statute does not require that the person making the demand to leave present documents or other evidence of possessory right sufficient to apprise defendant of the validity of the demand to leave, all of which renders the statute so vague and uncertain as applied to defendant as to violate his rights under the due process clause of the 14th Amendment of the United States Constitution.

6. Section 1436 of the General City Code of Birmingham of 1944 under which defendant, a Negro, was arrested and charged with violation of trespass upon land after being forbidden to enter is on the evidence unconstitutional as applied to defendant in that it makes it a crime to be on property open to the public after being asked to leave, because of race or color, in violation of defendant's rights under the due process and equal protection clauses of the 14th Amendment of the United States Constitution.

7. The evidence against defendant, a Negro, establishes that he, at the time of arrest and all times covered by the [fol. 7] complaint, was a member of the public, peaceably attempting to use a publicly owned facility, to-wit: and from which defendant was barred because of his race or color; that such denial was in accordance with a policy, custom and usage of Pizitz's eating facilities, of operating such facilities and services on a racially segregated basis, which policy, custom and usage violates the due process and equal protection clauses of the 14th Amendment of the Constitution of the United States.

8. The evidence offered against the defendant, a Negro, establishes that at the time of arrest and all times covered by the complaint he was a member of the public, attempting to use a facility, Pizitz's eating facilities, open to the public, which was denied to him solely because of race or color; that Pizitz's eating facilities, was and is offering, for a price, to serve all members of the public with food; that this public facility Pizitz's eating facilities, is, along with others of a similar nature, performing a necessary service for the public, which in fact, would have to be provided by the state if Pizitz's eating facilities and other like facilities were all to withdraw said service; that having determined to offer said valuable service to the public, Pizitz's eating facilities is required to provide such service in the manner of state operated facilities of a like nature, to wit: That Pizitz's eating facilities may not segregate or exclude defendant on the ground of race or color, in violation of the due process and equal protection clauses of the 14th Amendment of the United States Constitution.

Oscar W. Adams, Jr., Arthur D. Shores, J. Richmond Pearson, Orzell Billingsley, Jr., Peter A. Hall, Attorneys for Defendant.

[File endorsement omitted]

[fol. 8]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

Appealed from Recorder's Court

(Trespass After Warning)

Honorable Geo. Lewis Bailes, Judge Presiding

CITY OF BIRMINGHAM,

vs.

JAMES ALBERT DAVIS.

JUDGMENT ENTRY—October 10, 1960

This the 10th day of October, 1960, came Wm. C. Walker, who prosecutes for the City of Birmingham, and also came the defendant in his own proper person and by attorney, and the City of Birmingham files written Complaint in this cause, and the defendant being duly arraigned upon said Complaint for his plea thereto says that he is not guilty; and defendant files motion to strike, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion the defendant hereby duly and legally excepts; and the defendant files demurrers, and said demurrers being considered by the Court, it is ordered and adjudged by the Court that said demurrers be and the same are hereby overruled, to which action of the Court in overruling said demurrers the defendant hereby duly and legally excepts; and the defendant files motion to exclude the evidence, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion the defendant hereby duly and legally excepts; and on this the 11th day of October, 1960, the Court finds the defendant guilty as charged in the Com-

plaint and thereupon assessed a fine of One Hundred ($100.00) dollars and costs against said defendant. It is therefore considered by the Court, and it is the judgment of the Court that said defendant is guilty as charged in said Complaint, and that he pay a fine of One Hundred ($100.00) dollars and costs of this cause.

And said defendant being now in open Court, and having presently failed to pay the fine of $100.00 and the costs of $5.00 accrued in the Recorder's Court of the City of Birmingham, or to confess judgment with good and sufficient security for the same, it is therefore considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said James Albert Davis, perform hard labor for the City of Birmingham for fifty-two days, because of his failure to pay said fine and costs of $5.00 accrued in said Recorder's Court, or to confess judgment with good and sufficient security therefor.

It is further considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said James Albert Davis, [fol. 9] perform additional hard labor for the City of Birmingham for thirty days, as additional punishment in this cause.

And the costs legally taxable against the defendant in this cause amounting to fifty-one and 75/100 ($51.75) dollars, not being presently paid or secured, and $4.00 of said amount being State Trial Tax, $3.00, and Law Library Tax, $1.00, leaving forty-seven and 75/100 ($47.75) dollars taxable for sentence, it is ordered by the Court that said defendant perform additional hard labor for the County for sixty-four days, at the rate of 75 cents per day to pay said costs. It is further ordered by the Court that after the sentence for the City of Birmingham has expired that the City authorities return the defendant to the County authorities to execute said sentence for costs.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in this behalf expended for feeding the defendant while in jail, for which let execution issue.

And on this the 11th day of October, 1960, the defendant files motion for a new trial in this cause, and said motion coming on to be heard and determined by the Court, it is ordered by the Court, and it is the judgment of the Court that said motion be and the same is hereby overruled.

And notice of appeal being given, and it appearing to the Court that, upon the trial of this cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Appeals of Alabama, it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at $300.00, conditioned as required by Law.

[fol. 10]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20779

CITY OF BIRMINGHAM, a Municipal Corporation, Plaintiff,

vs.

JAMES ALBERT DAVIS, Defendant.

MOTION FOR A NEW TRIAL—Filed October 11, 1960.

Now comes the defendant, in the above styled cause, and with leave of the Court first had and obtained, and moves this Honorable Court to set aside the verdict and judgment rendered on to-wit, the 11th day of October, 1960, and that this Honorable Court will grant the defendant a new trial, and as grounds for said Motion sets out and assigns the following, separately and severally:

1. That the Judgment of the Court in said case is contrary to the law.

2. For that the judgment of the Court is contrary to the facts.

3. For that the judgment of the Court is contrary to the law in the case.

4. In that the judgment of the Court is not sustained by the great preponderance of the evidence in the case.

5. For that the Judgment of the Court is not sustained by the great preponderance of the evidence in the case.

6. For that the judgment of the Court is so unfair, as to constitute a gross miscarriage of justice.

7. For that the sentence is excessive.

8. For that the Court erred in over-ruling objections, by the defendant to the introduction of evidence on behalf of the City of Birmingham, Alabama, in this case.

9. For the Court erred in overruling objections by the defendant to the introduction of evidence which was so biased and prejudiced that the defendant was denied the right of a fair and impartial trial.

10. For the Court erred in overruling objections by the defendant to the introduction of evidence, which was so biased and prejudiced that the defendant was denied the right of a fair and impartial trial.

11. The Court erred in overruling defendant's demurrers filed in this cause.

[fol. 11] 12. The Court erred in overruling the defendant's Motion to Strike the Complaint in this cause.

13. The Court erred in finding the defendant guilty of violating the laws or ordinances of the City of Birmingham, Alabama, in that the laws or ordinances, under which this defendant was charged and convicted, and as applied to this defendant, constituted an abridgement of freedom of speech violative of rights and liberties secured to the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

14. That the Court erred in refusing to find that the ordinance under which this defendant was being tried, as

applied to this defendant, constituted a denial of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

15. That the Court erred in finding the defendant guilty of violating the laws or ordinances of the City of Birmingham, Alabama, in that the laws or ordinances under which this defendant was charged and convicted, and as applied to this defendant, constituted a deprivation of liberty, without due process of law, in violation of the Constitution of the State of Alabama, and the provisions of the Fourteenth Amendment to the United States Constitution.

16. The Court erred in overruling defendant's Motion to exclude the evidence in this case.

17. That it appeared from the evidence that no owner of the premises involved, had caused the arrest and prosecution of the defendant, but that such arrest was procured by the officials of the City of Birmingham, Alabama, without first having a complaint from such owner, or other person in charge of such premises.

18. For that it appears from the evidence that the defendant was not prosecuted by the owner of private property, as provided for by the pertinent laws or ordinances of the City of Birmingham, but by police officials.

19. For that it appears from the evidence affirmatively that no owner or other person in charge of the premises involved, or otherwise, having authority to do so, procured the arrest of the defendant or signed a complaint or swore out a warrant against defendant, for trespass on private property.

20. For that it affirmatively appears that the defendant was not requested to leave the premises of the store involved, but was only told to go elsewhere in the store.

[fol. 12] Arthur D. Shores, Orzell Billingsley, Jr., Peter A. Hall, J. Richmond Pearson, Oscar W. Adams, Jr., Attorneys for Defendant.

ORDER OVERRULING

The foregoing Motion being presented in open court, this the 11th day of October, 1960; the same being considered and understood, the Court is of the opinion that the same should be overruled.

George Lewis Bailes, Circuit Judge.

[File endorsement omitted]

APPEAL BOND TO COURT OF APPEALS (omitted in printing).

[fol. 14]

Transcript of Evidence—October 10, 1960

(omitted in printing)

COUNSEL'S NOTE RE RECORD

The parties stipulate that the trial transcript in the *Davis* case is identical to that in the *Gober* case.

[fol. 51]

TRANSCRIPT OF SENTENCING (omitted in printing).

[fol. 56]

REPORTER'S AND CLERK'S CERTIFICATES TO FOREGOING TRANSCRIPT (omitted in printing).

[fol. 58]

IN THE COURT OF APPEALS OF ALABAMA

JAMES ALBERT DAVIS, Appellant,

vs.

THE CITY OF BIRMINGHAM, Appellee.

ASSIGNMENT OF ERRORS

The Appellant says that there is manifest error in the foregoing Transcript of the Record of the proceedings, had and done in the Honorable Circuit Court of Jefferson County, Alabama, to the hurt and prejudice of this appellant, and for error assigns each of the following separately and severally:

1. The Court erred in overruling Appellant's Motion to Strike the Complaint in this cause, to which ruling Appellant took exception. (Tr. 2, 3, 8 & 16)

2. The Court erred in overruling Defendant's Demurrers filed in this cause, to which ruling appellant took exception. (Tr. 3, 4, 8 & 16)

3. The Court erred in overruling Appellant's Motion to Exclude the Evidence. (Tr. 5, 7, 8, 41 & 42)

4. The Court erred in overruling Appellant's Motion for a New Trial. (Tr. 9, 10, 12 & 55)

5. The Court erred in allowing Detective C. L. Pierce to testify relative to an alleged conversation had on April 1, with James Edward Gober and James Albert Davis, with reference to certain admissions of Appellant, in the nature of confession, over Appellant's objections, to which ruling Appellant took exception. (Tr. 37)

Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, Jr., J. Richmond Pearson, Attorneys for Appellant.

[fol. 59]

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 60]

IN THE COURT OF APPEALS OF THE STATE OF ALABAMA

.....JUDICIAL DEPARTMENT

October Term, 1960-61

6 Div. 796

JAMES ALBERT DAVIS,

v.

CITY OF BIRMINGHAM.

Appeal from Jefferson Circuit Court

November 2, 1960
CERTIFICATE FILED

January 30, 1961
TRANSCRIPT FILED

April 18, 1961

Come the parties by attorneys, and argue and submit this cause for decision.

ORDER OF AFFIRMANCE—May 30, 1961

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed, on authority of Gober v. City of Birmingham, 6th Division 797, Ala. App. Ms. It is also considered that the appellant pay the costs of appeal of this court and of the Circuit Court.

[fol. 61]

APPLICATION FOR REHEARING AND ORDER OVERRULING
(omitted in printing).

[fol. 61a]

PROCEEDINGS ON PETITION FOR CERTIORARI
(omitted in printing)

[fol. 62] [File Endorsement Omitted]

IN THE SUPREME COURT OF ALABAMA

No. 761 Sixth Division

Ex Parte: James Albert Davis

JAMES ALBERT DAVIS, Appellant,

v.

CITY OF BIRMINGHAM, Appellee.

PETITION FOR CERTIORARI—Filed July 3, 1961

[fol. 63] *To the Honorable Chief Justice and Associate Chief Justices of the Supreme Court of Alabama*

1. Comes the Appellant, by and through his Attorneys, Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, Jr., and J. Richmond Pearson, and respectfully petitions this Honorable Court to review, revise, reverse and hold for naught that certain Judgment of the Court of Appeals, on to-wit: May 30, 1961, wherein James Albert Davis was Appellant and the City of Birmingham was Appellee, which Judgment affirms the Judgment of the Circuit Court of Jefferson County, Alabama.

2. Your petitioner avers that application to the Court of Appeals for a Rehearing of said cause and Brief in support thereof were duly filed by your petitioner within the time required by law, and that said application for rehearing

was overruled by said Court of Appeals on the 20th day of June, 1961.

3. Your petitioner respectfully shows unto the Court that this cause arose from a complaint filed by the City of Birmingham, charging your petitioner with violating Sec. 1436 of the General City Code of Birmingham, viz:

> "Any person who enters into the dwelling house or goes or remains on the premises of another, after being warned not to do so, shall on conviction, be punished as provided in Sec. 4, provided that this Section shall not apply to police officers in discharge of official duties."

4. Your petitioner filed a Motion to Quash the Complaint and Demurrers to the Complaint, on grounds that the Complaint was so vague and indefinite as not to apprise the Appellant of what he was called upon to defend, and further, that the ordinance which formed the basis of the [fol. 64] prosecution, as applied to appellant, constituted an abridgement of the privileges and immunities guaranteed by the Constitution of the United States and that the ordinance was unconstitutional on its face.

5. The Court overruled the Motion to Quash and the Demurrers whereupon petitioner was tried without a jury, and was found guilty of Trespass after Warning, and fined One Hundred ($100.00) Dollars and costs, and sentenced to a term of Thirty (30) Days of hard labor for the City of Birmingham.

6. Your petitioner filed a Motion to Exclude the Evidence, at the close of the City's case, which Motion was denied. After judgment and sentences, petitioner filed a Motion for a New Trial, which Motion was denied, and petitioner perfected his appeal.

7. Your petitioner further shows unto Your Honors that the Court of Appeals erred in affirming and failing to reverse said cause, in the following ways, to-wit: The Court based its judgment in this cause upon the opinion judgment Birmingham, Sixth Division—797, decided May 30, 1961. rendered in the case of James Albert Davis vs. City of

8. That the Propositions of Law involved, which petitioner claims should be reviewed and revised by this Court, are as follows:

A. That the Ordinance and Complaint, the basis of the prosecution, are unconstitutional on their face, that they are so vague, indefinite and uncertain as to constitute a deprivation of liberty, without due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

b. That the Ordinance and Complaint, the basis of the prosecution, as applied to petitioner, constitute an abridgement of the privileges and immunities, and a denial of the equal protection of the laws, all in violation of the Fourteenth Amendment to the United States Constitution.

The Court of Appeals erred in failing to rule that the conviction of petitioner was a violation of due process of law, an abridgement of the privileges and immunities of the petitioner, in that the petitioner was denied equal protection of the law, all in violation of the Fourteenth Amendment to the Constitution of the United States.

[fol. 65] Wherefore, Your petitioner most respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals of Alabama, commanding and requiring said Court to certify and send to this Court, on a day certain to be designated by this Court, a full and complete transcript of record, and all proceedings of said Court of Appeals of Alabama, in the Cause numbered and entitled aforesaid, to the end that this cause may be reviewed and determined by this Honorable Court, as provided by law and the rules and practice of this Court, and that this Court thereupon proceed to review and correct the errors complained of and to reverse the Judgment of the Court of Appeals or render such Judgment as said Court should have rendered.

Petitioner prays that this Honorable Court suggest and require the Court of Appeals to Stay or recall its Certificate of Affirmance of said cause, during the pendency of this petition.

And petitioner prays for such other, further and additional relief in the premises as to this Court may seem appropriate, and to which he may be entitled, and your petitioner will ever pray.

Respectfully submitted,

Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, Jr., J. Richmond Pearson, Attorneys for Appellant.

[fol. 66] *Duly sworn to by Oscar W. Adams, Jr., jurat omitted in printing.*

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 67]

ORDER DENYING PETITION FOR WRIT OF CERTIORARI (omitted in printing)

[fol. 68]

APPLICATION FOR REHEARING (omitted in printing)

[fol. 69]

ORDER OVERRULING APPLICATION FOR REHEARING (omitted in printing)

[fol. 70]

CLERKS' CERTIFICATES TO FOREGOING TRANSCRIPT (omitted in printing)

[fol. 1]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA IN AND FOR JEFFERSON COUNTY

No. 20781

THE CITY OF BIRMINGHAM,

vs.

ROY HUTCHINSON.

APPEAL BOND (omitted in printing)

[fol. 2]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20781

CITY OF BIRMINGHAM, a Municipal Corporation, Plaintiff,

vs.

ROY HUTCHINSON, Defendant.

COMPLAINT—Filed October 10, 1960

Comes the City of Birmingham, Alabama, a municipal corporation, and complains that Roy Hutchinson, within twelve months before the beginning of this prosecution and within the City of Birmingham or the police jurisdiction thereof, did go or remain on the premises of another, said premises being the area used for eating, drinking and dining purposes and located within the building commonly and customarily known as Loveman's Department Store, located at 216 North 19th Street, Birmingham, Alabama, after being warned not to do so, contrary to and in violation of Section 1436 of the General City Code of Birmingham of 1944.

Watts E. Davis, Attorney for City of Birmingham.

[File endorsement omitted]

94

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20781

CITY OF BIRMINGHAM,

vs.

ROY HUTCHINSON.

MOTION TO STRIKE—Filed October 10, 1960

Comes now Roy Hutchinson, defendant in this cause, and moves to strike the complaint in this cause, and as grounds for said Motion, sets out and assigns the following, separately and severally:

1. That the complaint, affidavit, etc., is not sworn to.

2. That the allegations of the said complaint are so vague and indefinite, as not to apprise this defendant of what he is called upon to defend.

3. That the ordinance or statute upon which is founded the complaint in this cause, as applied to this defendant, as a citizen of the State of Alabama, and of the United States, constitutes an abridgment of the freedom of assembly, speech and liberties secured to the Defendant, by the [fol. 3] Constitution and laws of the State of Alabama and the Fourteenth Amendment of the Constitution of the United States of America.

4. That the said ordinance or statute which is the basis for the affidavit, information or complaint in this cause, as applied to the defendant, constitutes an abridgment of privileges and immunities guaranteed defendant, as a citizen of the United States, in violation of the Constitution and laws of the State of Alabama, and of the Fourteenth Amendment of the United States Constitution.

5. That Section 824 of the General City Code of the City of Birmingham, as applied to this defendant, a Negro

citizen of the United States, constitutes a denial of due process and equal protection of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

6. That the said affidavit, information or complaint, does not charge any offense, which is cognizable by this court.

Arthur D. Shores, J. Richmond Pearson, Orzell Billingsley, Jr., Peter A. Hall, Attorneys for Defendant.

[File endorsement omitted]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20781

CITY OF BIRMINGHAM,

vs.

ROY HUTCHINSON.

DEMURRERS—Filed October 10, 1960

Comes now Roy Hutchinson, defendant in this cause, and demurs to the complaint in this cause, and to each and every count thereof, separately and severally, and as grounds for such demurrer sets out and assigns the following, separately and severally:

1. The affidavit or information which supports the complaint in this cause, does not charge defendant with any offense under the Constitution and laws of the State of Alabama.

[fol. 4] 2. That the complaint, affidavit, or information upon which this cause is based is insufficient to support prosecution of this cause, in that no offense is charged which is cognizable by this Honorable Court.

3. That the allegations of the complaint and each count thereof are so vague and indefinite as not to apprise this defendant of what he is called upon to defend.

4. That the ordinance, Section 1436 of the 1944 General City Code of Birmingham, Alabama, as applied to this defendant, is invalid in that it violates Section 4, Article 1, of the Constitution of Alabama, and the First and Fourteenth Amendments to the Constitution of the United States of America.

5. That Section 1436 of the 1944 General City Code of Birmingham, Alabama, which supports the complaint, affidavit or information in this cause, as applied to this defendant, a citizen of the State of Alabama and of the United States, constitutes an abridgment of freedom of speech and assembly violative of rights and liberties secured the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

6. That the aforesaid ordinance as applied to defendant, is unconstitutional on its face in that it is so vague as to constitute a deprivation of liberty without due process of law in violation of the provisions of the Fourteenth Amendment to the United States Constitution.

7. That the said Ordinance or Statute in this case, as applied to defendant, constitutes an abridgment of privileges and immunities guaranteed defendant as a citizen of the United States, in violation of the Fourteenth Amendment to the United States Constitution.

8. That the said Ordinance, as applied to defendant, constitutes a denial of equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States of America.

Arthur D. Shores, Orzell Billingsley, Jr., J. Richmond Pearson, Peter A. Hall, Oscar W. Adams, Jr., Attorneys for Defendant.

[File endorsement omitted]

[fol. 5]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20781.

CITY OF BIRMINGHAM, Plaintiff,

versus

ROY HUTCHINSON, Defendant.

MOTION TO EXCLUDE THE EVIDENCE—Filed October 10, 1960

1. The complaint charging defendant, a Negro, with violation of 1436 of the General City Code of Birmingham of 1944, to-wit, an alleged trespass upon land after being forbidden to enter or remain after told to leave is invalid in that the evidence establishes merely that defendant was peacefully upon the premises of Loveman's, an establishment performing an economic function invested with the public interest, as a customer, visitor, business guest or invitee, and there is no basis for the charge recited by the complaint other than an effort to exclude defendant from Loveman's Eating Facilities because of his race or color; defendant, at the same time is excluded from equal service at the preponderant number of other similar eating establishments in Birmingham, Alabama; thereby depriving him of liberty without due process of law and of the equal protection of the laws secured by the 14th Amendment of the United States Constitution.

2. The evidence offered against defendant, a Negro, in support of the complaint charging him with violation of trespass upon land after being forbidden to enter establishes that he was, at the time of arrest and at all times covered by the charge, in peaceful exercise of constitutional rights to assemble with others for the purpose of speaking and protesting against the practice, custom and usage of racial discrimination in Loveman's, an establishment performing an economic function invested with the public interest; that defendant peacefully was attempting to ob-

tain service in the facilities of Loveman's in the manner of white persons similarly situated, and at no time was defendant defiant or in breach of the peace and was at all times upon an area essentially public, wherefore defendant has been denied rights secured by the due process and equal protection clauses of the 14th Amendment of the United States Constitution.

3. The evidence establishes that prosecution of defendant was procured for the purpose of preventing him from engaging in peaceful assembly with others for the purpose of speaking and otherwise peacefully protesting in public places the refusal of the preponderant number of stores, facilities and accommodations open to the public in Birmingham [fol. 6] ham, Alabama to permit defendant, a Negro, and other members of defendant's race from enjoying the access to such stores, facilities and accommodations afforded members of other races; and that by this prosecution, prosecuting witnesses and arresting officers are attempting to employ the aid of the Court to enforce a racially discriminatory policy contrary to the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States.

4. The evidence against defendant, a Negro, in support of the complaint charging him with violation of trespass upon land after being forbidden to enter clearly indicates that defendant at the time of his arrest, had accepted an invitation to enter and purchase articles in Loveman's, a store open to the public, but had not been allowed to obtain food service on the same basis as that offered white persons, because of defendant's race or color; and, that in furtherance of this racially discriminatory practice of Loveman's, defendant was arrested on the basis of race or color, under color of law, to enforce racially discriminatory policy, thereby violating defendant's rights under the equal protection and due process clauses of the 14th Amendment of the United States Constitution.

5. The statute or ordinance (1436 of the General City Code of Birmingham of 1944) under which defendant, a Negro, was arrested and charged is unconstitutional on its

face by making it a crime to be on public property after being asked to leave by an individual at such individual's whim, in that said statute does not require that the person making the demand to leave present documents or other evidence of possessory right sufficient to apprise defendant of the validity of the demand to leave, all of which renders the statute so vague and uncertain as applied to defendant as to violate his rights under the due process clause of the 14th Amendment of the United States Constitution.

6. Section 1436 of the General City Code of Birmingham of 1944 under which defendant, a Negro, was arrested and charged with violation of trespass upon land after being forbidden to enter is on the evidence unconstitutional as applied to defendant in that it makes it a crime to be on property open to the public after being asked to leave, because of race or color, in violation of defendant's rights under the due process and equal protection clauses of the 14th Amendment of the United States Constitution.

7. The evidence against defendant, a Negro, establishes that he, at the time of arrest and all times covered by the [fol. 7] complaint, was a member of the public, peaceably attempting to use a publicly owned facility, to-wit: Loveman's and from which defendant was barred because of his race or color; that such denial was in accordance with a policy, custom and usage of Loveman's, of operating such facilities and services on a racially segregated basis, which policy, custom and usage violates the due process and equal protection clauses of the 14th Amendment of the Constitution of the United States.

8. The evidence offered against the defendant, a Negro, establisnes that at the time of arrest and all times covered by the complaint he was a member of the public, attempting to use a facility, Loveman's, open to the public, which was denied to him solely because of race or color; that ....., was and is offering, for a price, to serve all members of the public with food; that this public facility Loveman's, is, along with others of a similar nature, performing a necessary service for the public, which in fact, would have to be provided by the state if ..... and other like facilities

were all to withdraw said service; that having determined to offer said valuable service to the public, ... is required to provide such service in the manner of state operated facilities of a like nature, to wit: That Loveman's may not segregate or exclude defendant on the ground of race or color, in violation of the due process and equal protection clauses of the 14th Amendment of the United States Constitution.

Arthur D. Shores, J. Richmond Pearson, Orzell Billingsley, Jr., Attorneys for Defendant.

[File endorsement omitted]

[fol. 8]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

CITY OF BIRMINGHAM,

vs.

ROY HUTCHINSON.

Appealed from Recorder's Court

(Trespass After Warning)

Honorable Geo. Lewis Bailes, Judge Presiding

JUDGMENT ENTRY—Filed October 10, 1960

This the 10th day of October, 1960, came Wm. C. Walker, who prosecutes for the City of Birmingham, and also came the defendant in his own proper person and by attorney, and the City of Birmingham files written Complaint in this cause; and the defendant being duly arraigned upon said Complaint for his plea thereto says that he is not guilty; and defendant files motion to strike, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same

is hereby overruled, to which action of the Court in overruling said motion the defendant hereby duly and legally excepts; and the defendant files demurrers, and said demurrers being considered by the Court, it is ordered and adjudged by the Court that said demurrers be and the same are hereby overruled, to which action of the Court in overruling said demurrers the defendant hereby duly and legally excepts; and the defendant files motion to exclude the evidence, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion, the defendant hereby duly and legally excepts, and on this the 11th day of October, 1950, the Court finds the defendant guilty as charged in the Complaint and thereupon assessed a fine of One Hundred ($100.00) dollars and costs against said defendant. It is therefore considered by the Court, and it is the judgment of the Court that said defendant is guilty as charged in said Complaint, and that he pay a fine of One Hundred ($100.00) dollars and costs of this cause.

And said defendant being now in open Court, and having presently failed to pay the fine of $100.00 and the costs of $5.00 accrued in the Recorder's Court of the City of Birmingham, or to confess judgment with good and sufficient security for the same, it is therefore considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said Roy Hutchinson, perform hard labor for the City of Birmingham for fifty-two days, because of his failure to pay said fine and costs of $5.00 accrued in said Recorder's Court, or to confess judgment with good and sufficient security therefor.

[fol. 9] It is further considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said Roy Hutchinson, perform additional hard labor for the City of Birmingham for thirty days, as additional punishment in this cause.

And the costs legally taxable against the defendant in this cause amounting to forty-eight and 75/100 ($48.75)

dollars, not being presently paid or secured, and $4.00 of said amount being State Trial Tax, $3.00, and Law Library Tax, $1.00, leaving forty-four and 75/100 ($44.75) dollars taxable for sentence, it is ordered by the Court that said defendant perform additional hard labor for the County for sixty days, at the rate of 75c per day to pay said costs. It is further ordered by the Court that after the sentence for the City of Birmingham has expired, that the City authorities return the defendant to the County authorities to execute said sentence for costs.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in this behalf expended for feeding the defendant while in jail, for which let execution issue.

And on this the 11th day of October, 1960, the defendant files motion for a new trial in this cause, and said motion coming on to be heard and determined by the Court, it is ordered by the Court, and it is the judgment of the Court that said motion be and the same is hereby overruled.

And notice of appeal being given, and it appearing to the Court that, upon the trial of this cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Appeals of Alabama it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at $300.00, conditioned as required by Law.

[fol. 10]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20781

CITY OF BIRMINGHAM, a Municipal Corporation, Plaintiff,

vs.

ROY HUTCHINSON, Defendant.

MOTION FOR A NEW TRIAL—Filed October 11, 1960

Now comes the defendant, in the above styled cause, and with leave of the Court, first had and obtained, and moves this Honorable Court to set aside the verdict and judgment rendered on to-wit the 11th day of October, 1960, and that this Honorable Court will grant the defendant a new trial, and as grounds for said Motion sets out and assigns the following separately and severally:

1. That the Judgment of the Court in said case, is contrary to the law.

2. For that the Judgment of the Court is contrary to the facts.

3. For that the Judgment of the Court is contrary to the law in the case.

4. In that the Judgment of the Court is not sustained by the great preponderance of the evidence in the case.

5. For that the Judgment of the Court is not sustained by the great preponderance of the evidence in the case.

6. For that the Judgment of the Court is so unfair, as to constitute a gross miscarriage of justice.

7. For that the sentence is excessive.

8. For that the Court erred in over-ruling objections, by the defendant to the introduction of evidence on behalf of the City of Birmingham, Alabama, in this case.

9. For the Court erred in overruling objections by the defendant to the introduction of evidence, which was so biased and prejudiced that the defendant was denied the right of a fair and impartial trial.

10. For the Court erred in overruling objections by the defendant to the introduction of evidence, which was so biased and prejudiced that the defendant was denied the right of a fair and impartial trial.

11. The Court erred in overruling defendant's demurrers filed in this cause.

12. The Court erred in overruling the defendant's Motion to Strike the Complaint in this cause.

13. The Court erred in finding the defendant guilty of violating the laws or ordinances of the City of Birmingham, Alabama, in that the laws or ordinances, under which this [fol. 11] defendant was charged and convicted, and as applied to this defendant, constituted an abridgement of freedom of speech violative of rights and liberties secured to the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

14. That the Court erred in refusing to find that the ordinance under which this defendant was being tried, as applied to this defendant, constituted a denial of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

15. That the Court erred in finding the defendant guilty of violating the laws or ordinances of the City of Birmingham, Alabama, in that the laws or ordinances under which this defendant was charged and convicted, and as applied to this defendant, constituted a deprivation of liberty, without due process of law, in violation of the Constitution of the State of Alabama, and the provisions of the Fourteenth Amendment to the United States Constitution.

16. The Court erred in overruling defendant's Motion to exclude the evidence in this cause.

17. That it appeared from the evidence that no owner of the premises involved had caused the arrest and prosecution of the defendant, but that such arrest was procured by the officials of the City of Birmingham, Alabama, without first having a complaint from such owner, or other person in charge of such premises.

18. For that it appears from the evidence that the defendant was not prosecuted by the owner of private property, as provided for by the pertinent laws or ordinances of the City of Birmingham, but by police officials.

19. For that it appears from the evidence affirmatively that no owner or other person in charge of the premises involved, or otherwise, having authority to do so, procured the arrest of the defendant or signed a complaint or swore out a warrant against defendant for trespass on private property.

20. For that it affirmatively appears that the defendant was not requested to leave the premises of the store involved, but was only told to go elsewhere in the store.

Arthur D. Shores, Orzell Billingsley, Jr., Peter A. [fol. 12] Hall, J. Richmond Pearson, Oscar W. Adams, Jr., Attorneys for Defendant.

ORDER OVERRULING

The foregoing Motion being presented in open court, this the 11th day of October, 1960; the same being considered and understood, the Court is of the opinion that the same should be overruled.

George Lewis Bailes, Circuit Judge.

[File endorsement omitted]

APPEAL BOND TO COURT OF APPEALS (omitted in printing).

[fol. 14]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
OF ALABAMA IN AND FOR JEFFERSON COUNTY

No. 20781

THE CITY OF BIRMINGHAM, a Municipal Corporation,

versus

ROY HUTCHINSON.

Birmingham, Alabama

Transcript of Evidence—October 10, 1960

Before: Honorable GEORGE L. BAILES, Judge.

APPEARANCES:

For the City, Mr. Watts E. Davis.

For the Defendant, Messrs. A. D. Shores, Orzell Billingsley, Jr., Peter A. Hall, Oscar W. Adams, Jr., J. Richmond Pearson.

[fol. 16] *Proceedings*

The Court: Let the record show that there is a stipulation that Robert Kind and Roy Hutchinson were both present in Court and tried together. Let the record show that.

Mr. Billingsley: Your Honor, we filed the same motions as in the other cases with the understanding that we will have the same rulings and an exception.

Mr. Davis: If the Court pleases, I believe there are some witnesses in this case in the Courtroom and they have asked for the rule in each of the cases.

(Witnesses placed under the Rule.)

Mr. Davis: Mr. Martin.

ELWOOD K. MARTIN, called as a witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Davis:

Q. Will you state your full name, please, sir?
A. Elwood K. Martin.
Q. You are employed by the City of Birmingham as a police officer?
A. Yes, sir.
Q. Were you so employed on March 31, 1960?
A. Yes, sir.
Q. Mr. Martin, on March 31, of this year did you receive a call or an order to go to Loveman's Department Store?
A. Yes, sir.
Q. Is that in the City of Birmingham?
A. Yes, sir.
Q. Third Avenue and 19th Street North?
A. Yes, sir.
Q. Did you go to the dining or eating area inside of [fol. 17] Loveman's?
A. Yes, sir, I did.
Q. What did you observe taking place in and about near or at the eating place when you arrived there?
A. I noticed that a rope had been tied from one post to another post going up to the mezzanine or the eating place of Loveman's with a sign on it stating closed. I went over that and went up to the cashier's cage there at Loveman's. I noticed two Negro boys sitting to the right of the Cashiers' cage at the tables there where food is served.
Q. Did you have any conversation yourself with these boys?
A. With the boys?
Q. Yes, sir.
A. None other than to tell them they were under arrest.
Q. Was there any conversation—I withdraw that—how did you receive word to go to Loveman's?
A. A three-wheeled motor cycle came up, Officer J. L. Holt, and told me to get on his motor cycle and go with him to Loveman's.

Mr. Davis: I believe that is all.

Cross-examination.

By Mr. Adams:

Q. Officer Martin, is there any sign where these two defendants were sitting indicating whether this was white or Negro eating facilities?

A. I did not observe any signs other than the closed sign.

Q. Were the lights turned off?

A. I can't recall.

Q. Was there anybody else seated at the counter besides these two defendants?

A. There was no one seated at any table. There is no counter there the best I can remember. They are all tables. I believe there was no one else seated at any table.

Q. Did anybody from Loveman's inform you that they had told these two boys to leave?

[fol. 18] A. They did not inform me personally. They informed one of my superior officers.

Q. Do you know that of your own personal knowledge?

A. I don't know that of my own personal knowledge.

Q. Who was it that informed him?

A. I do not know what capacity he was but his name was either Schultz or Smith. I forget which one his name was. Schultz I believe or Smith. I forget which one it was.

Q. Did you issue a warrant for the arrest of these two boys?

A. Did I issue a warrant?

Q. Yes.

A. No, I did not.

Q. Did you have a warrant for their arrest?

A. I did not.

Q. Did anyone on the premises when you arrived on the premises inform you that they had told these boys to leave?

A. They did not tell me personally that they had told them to leave. They told my superior officer.

Q. Is Loveman's a store that is offering merchandise to the public generally?

A. I am under the assumption they do. I do not know personally.

Q. Do you know whether or not they have separate lunch counters for Negroes and for whites?

A. I do not know that.

Q. Were these two defendants boisterous when you arrived at the scene?

A. No, they were not.

Q. Was there any disorder at the lunch table?

A. There was no disorder other than the fact that they were sitting at the table. As far as their, as far as them being disorderly they were not disorderly.

Q. What charge did you place against these defendants, [fol. 19] Officer Martin?

A. Trespassing after warning.

Mr. Adams: That is all.

Mr. Davis: No further questions. Mr. Schmid.

Carl A. Schmid, called as a witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Davis:

Q. Will you state your full name?

A. Carl A. Schmid.

Q. By whom are you employed, Mr. Schmid?

A. I personally am employed by Price Candy Company of Kansas City.

Q. Were you employed by Price Candy Company on March 31, of this year, sir?

A. Yes.

Q. Did you have a concession in Loveman's?

A. Yes.

Q. What is their concession?

A. All of the food departments, candy factory and retail candy departments.

Q. I will ask you if on the morning of March 31, of this year if two colored boys came and sat down in the dining area at Loveman's?

A. Yes, sir.

Q. I believe that is on the mezzanine?

A. That is right.

Q. Did you have occasion to talk to these two boys on that occasion?

A. No, I did not.

Q. Did anyone employed by your company or by Loveman's ask either of these boys to move?

A. Yes.

[fol. 20] Mr. Hall: If Your Honor please, we object to that answer unless—he said did anyone ask them to move without saying it was in his presence.

The Court: Did he hear anyone suggest to the two lads that they moved?

Mr. Hall: It was not asked that way. He asked did anyone tell them to move.

The Court: Did you hear them?

The Witness: Yes.

Mr. Hall: If he heard it that is different.

Q. Did anyone in your hearing tell either or both of these two boys to move?

A. Yes.

Q. Who was that?

A. Mr. Kidd.

Q. Mr. Kidd?

A. Mr. Kidd, yes.

Q. What is his capacity or connection there?

A. He is in the Protection Department.

Q. Is that the store detective?

A. Store detective.

Q. Who is he employed by?

A. Loveman's.

Q. Now the conversation he had with these two boys was in your presence?

A. I was present, yes.

Q. What did he tell them to do?

A. He announced in general terms that the tearoom was closed and for everyone please to leave.

Q. Did everyone leave?

A. Most of them. I mean quite a few people left. Of

course some of them started to eat and tried to finish their luncheon naturally.

Q. Were the two colored boys eating?

[fol. 21] A. No.

Q. Did they make any remarks or statement to Mr. Kidd in your presence?

A. No.

Q. And did they get up and leave?

A. No.

Q. Did they remain seated until the police arrived?

A. Yes.

Mr. Davis: That is all.

Cross examination.

By Mr. Adams:

Q. How do you spell your name?

A. S-C-H-M-I-D.

Q. When these two defendants were seated there, this was at Loveman's?

A. Yes.

Q. How many whites were also seated there?

A. Oh, it was early in the morning and I don't think there were more than maybe 40 or 50 there.

Q. What was the name of the person who made the statement, you made the statement in your words in general terms that the lunchroom was closed. Who was that?

A. Mr. Kidd.

Q. Now when he did that how many whites left and how many were left sitting there after that statement was made?

A. Well, as I said, they gradually moved out. Some of them that just had coffee or Coca-Cola left immediately, but some of them had light luncheons or regular luncheons did not leave.

Q. They stayed there?

A. Until they finished their luncheon, yes.

Q. Were you there when Officer Elwood Martin came?

A. Well I am not sure about the name; but the Lieutenant in the case was Mr. Purvis. He came to see me and asked, "Are you Mr. Schmid?" And I said, yes.

[fol. 22] Q. That is all right. When the officer did come the two defendants were still seated in the lunchroom, is that correct?

A. Uh-huh.

Q. Now what happened when he arrived and they were still seated there?

A. Mr. Purvis came to me and he said, "Are you the Manager?" And I said, "Yes." He said someone called us that you had two people in here that were trying to be served and I said, "Yes," and he said, "Where are they?" And I said, over there.

Q. Did he say two people or did he say two Negroes?

A. Two people.

Q. Do you in Loveman's call the police department when two people try to be served?

A. As far as I am concerned at Loveman's if there is any difficulty regardless of what they are, disturbance of the peace, or anything, we call the protective department.

Q. Was there any disturbance of the peace?

A. It naturally is you know in this case.

Q. What happened?

A. Well immediately the waiters went off the floor. They didn't want to wait on anyone. The waiters were leaving.

Q. They left the premises?

A. They left the floor immediately.

Q. That is when you called the police?

A. I didn't call them. I don't know who called but my secretary and the cashier had strict instructions if anything should come up like that, any disturbance to call the detective. Now who called, I don't know.

Q. What was the disturbance, Mr. Schmid?

A. Just the natural thing, it was an unusual thing to happen.

Q. What was it that was unusual?

A. When the waiters left the floor.

Q. And someone called the police officers because the waiters left the floor?

[fol. 23] A. I don't know who called the police. I know someone called the Protective Department in the store. I was not on the floor at the time myself.

Q. Now, Mr. Schmid, isn't there, what you are saying

isn't it that the police officers were called because two Negroes were sitting there? Isn't that what you are trying to say?

A. No, I wouldn't know.

Q. Isn't that unusual?

A. Oh, it is very unusual, I think, yes.

Q. Is that what caused the disturbance?

A. In my opinion it did.

Q. Now when the police officer came did he put these two Negroes under arrest?

A. I don't know.

Q. Did you see the police officers take the two Negroes out?

A. I don't think I was there right at the time when he took them out if he did take them out.

Q. When did you find out that they were gone?

A. Well I don't know. My office is back in the corner. I was not right there when they took them out.

Q. When the officers came you left, is that right?

A. I left.

Q. In the midst of the disturbance you left? Now how many whites were still sitting there when the two Negroes were there, when the police officers came?

A. Oh, I would say probably 40, to start, and there was probably about 25 there.

Q. Twenty-five there?

A. Yes.

Q. Did they take any of them out?

A. No, not that I know of.

Q. Did they arrest any of the whites?

A. If they did I don't know anything about it.

[fol. 24] Q. You never heard anything about it?

A. No.

Q. You have not been called on to testify about any of them?

A. No.

Q. Do you have a sign on the place for whites only?

A. No.

Q. Do you have any separate accommodations for Negroes at Loveman's?

A. Not to my knowledge.

Q. You just have one eating facility?
A. We have two, one in the basement.
Q. Is that for whites only?
A. Yes.
Q. And the one upstairs is for whites only, too?
A. Yes.
Q. Mr. Schmid, Loveman's is a Department Store serving general households, furnishings, notions and general goods to the public, is that correct?
A. I presume so, yes.
Q. Is your company so far as you know authorized to have an operation in Loveman's?
A. Uh-huh.
Q. Your position is what, Mr. Schmid?
A. I am the Manager.
Q. You work under I think the Price Candy Company?
A. But we follow Loveman's regulations and policies.

Mr. Adams: That is all.

Mr. Davis: No further questions. Would you tell Mr. Kidd to come in.

D. V. KIDD, called as a witness, having been first duly sworn, testified as follows:

[fol. 25] Direct examination.

By Mr. Davis:

Q. Will you state your full name, please, sir?
A. D. V. Kidd.
Q. Are you now and were you employed on March 31, 1960 with Loveman's Department Store?
A. I was.
Q. It is in the City of Birmingham?
A. Yes.
Q. Mr. Kidd, in what capacity were you then affiliated with Loveman's, March 31?
A. Store Detective, store protection as it is referred to.
Q. Do you recall any unusual situation existing on the morning of March 31, 1960 in and around the mezzanine eating area at Loveman's?

A. There was two colored boys sitting on the mezzanine and I notified the people who were milling around, I notified all of the people, white people, to leave as we were closing the mezzanine in their presence, I did not directly speak to the two colored boys who were sitting at a table, but they overheard what I told the white people that we were closing the lunch room.

Mr. Hall: If Your Honor please, we object to Mr. Kidd's conclusion that the defendants overheard anything and ask it be stricken.

The Court: All right.

Q. They were seated at tables on the mezzanine?

A. Yes, sir.

Q. There are no counters?

A. It was at tables spaced approximately three feet apart in either direction from wall-to-wall.

Q. Do you know the names of these two boys Mr. Kidd?

A. No, sir, I do not.

[fol. 26] Q. Do you see either one of them in the Courtroom here?

A. Well, I did not pay any attention to who they were because their backs were to me and I was notifying the people in the adjacent area.

Q. Did the police officer arrest them in your presence?

A. No, sir, I was in the back of the mezzanine inviting, notifying people we were closing the mezzanine at the time when the officers came in and I seen them leaving going downstairs to the first floor.

Q. And there were only two colored boys there that morning seated in the eating area?

A. Yes, sir.

Q. The table these two boys were seated at was near or adjacent to a table occupied by white people?

A. It was.

Q. Did you see, did you say in their presence that the place was closed, in their presence and hearing?

A. Yes, sir, that we were closing the place and would they please—

Q. Excuse me, go ahead.

A. That we were closing the place and would they please move.

Q. How many times did you announce that in the eating area?

A. Three times.

Q. Three times?

A. At three different tables adjacent to the table they were occupying.

Q. Did you announce the place was closed?

Is that the way you put it?

A. Yes, sir, closed.

Q. Did you hang up a sign of some sort in the area indicating the place was closed?

A. Yes, sir, we did.

Q. Did these boys ask for service after the whites had gone out?

[fol. 27] A. That I do not recall, because I was only on the mezzanine area back near the wall. I could not see them or hear what they had to say.

Q. How near were you to them when you announced the place was closed on the occasion you were close to them?

A. Three feet.

Q. Three feet?

A. Three feet on either side on three different sides which was three different tables that bordered the table they were occupying.

Q. Did they make any reply whatever to you?

A. No, sir.

Q. Did they move at all?

A. No, sir, they remained seated.

Q. How long did they remain seated after you announced the place was closed?

A. They were there I would say about five minutes. By that time the officers had arrived and were going down the stairway with them.

Mr. Davis: I believe that is all.

Cross-examination.

By Mr. Adams:

Q. What was your reason for closing the place?

A. Mr. Schmid had ordered the place to be closed. Mr. Schmid is the Manager for the cafeteria or eating room, tearoom as it is referred to by the company.

Q. Would your statement be the same if I informed you, Mr. Schmid's testimony was to the effect that he did not order these boys to leave, he did not close the place down but it was your instructions that the place be closed.

A. Mr. Schmid placed a sign up when I announced the place was closed.

Q. In other words, he did it after you made your state-[fol. 28] ment that the place was closed?

A. Yes, sir.

Q. Well it was your statement that closed the place down?

A. That we were closing the place.

Q. You were the one that made that statement. Now what was it Mr. Kidd that caused you to close the place down?

A. The commotion that was on the mezzanine. I did not know what was the cause of the commotion. When I began closing the place down then I noticed after the crowd had dispersed that the two colored boys were occupying a table.

Q. What was the commotion you referred to?

A. The people were standing up milling around.

Q. Don't people stand up and mill around frequently?

A. Not in that order.

Q. Mr. Kidd, if people had been standing up milling around, would you have closed the place down, if there had been no Negroes sitting there?

Mr. Davis: We object to that as speculative and calls for a mental operation incompetent, irrelevant, immaterial.

The Court: I would leave that out.

Mr. Adams: We except.

Q. Were these Negroes who were seated there boisterous, rude or anything of the nature?

A. No, they just remained seated.

Q. And did quite a few of the white patrons still remain seated while they were seated there?

A. Definitely not. That is the way the commotion started by the people getting up and leaving the area.

Q. All of the white people got up when these Negroes were seated there?

A. They did.

Q. They left their food?

A. Left their food.

Q. Didn't finish their plates or anything?

[fol. 29] A. They did not.

Q. Well now isn't it a fact some of them did move and Mr. Kidd didn't some of them stay there and finish their meals?

A. They did not.

Q. All of them got up and left?

A. Right.

Q. Everyone?

A. Right.

Q. Did you see the police officers arrest the two defendants?

A. I seen them coming down the stairway from the mezzanine to the first floor with them.

Q. Did you call the City of Birmingham?

A. I did not.

Q. Do you know who called the City of Birmingham?

A. I do not.

Q. So far as you know didn't anybody call them, is that right?

A. That is right.

Q. Did you tell any officer what had happened when he got there?

A. To the best of my knowledge I don't recall having offhand a conversation outside that I had noticed the people were milling around and I had found the two colored boys sitting there and we had closed the tea area.

Q. When the officers came where was Mr. Schmid?

A. He was on the mezzanine.

Q. Was he there when the officers took the two Negro defendants away?

A. That I wouldn't say because I was in the back of the mezzanine and the pillars of the mezzanine obstructed my view.

Q. Do Negroes trade at other departments in Loveman's?

A. They do.

Q. Do they have separate accommodations in any other department at Loveman's?

[fol. 30] A. That I do not recall.

Q. You have never seen any, have you?

A. No.

Q. Do you have any separate accommodations at all for Negroes and whites in Loveman's?

A. We do up on the seventh floor, a place that we may be able to serve colored.

Q. Food?

A. Yes.

Q. And that is for Negroes?

A. Well the colored use that area, that particular area.

Q. Can whites use it?

A. Well I have never been in the place. I wouldn't recall whether they have any signs or not.

Q. Do you know whether they do serve Negroes there?

A. They do serve them.

Q. Do they serve Negroes in the place where these two Negroes were arrested?

A. I don't recall ever seeing any colored served in the tearoom.

Q. Do you know whether or not they would be served?

A. I don't know what the store policy is.

Mr. Davis: We object to that. It is all incompetent, irrelevant and immaterial. I have tried to be patient and tolerant.

Mr. Adams: Judge, I think it is quite relevant. Our theory of the case is that Loveman's is a public department store, invites people and the public generally to purchase goods for their comfort and well-being and they invite them to come in. People are invitees in Loveman's and they have no policies so far as separation or discrimination in any place except their lunchroom and tearoom. And we contend that policy and the law which permits it vio-

lates these defendants' rights. So therefore I think all that I have said is material, whether you agree with that [fol. 31] position or not, it is certainly material on the issues raised in this case.

The Court: I am ashamed to admit I didn't get the last question.

(Question read as follows: Do you know whether or not they would be served?)

The Court: I don't think you could ask what would happen in the subjunctive mood. I don't think you can do that, but leave it in.

Q. I wanted to ask him—do you know whether Loveman's is a store which invites people and the public generally to purchase goods there?

A. They do.

Mr. Davis: What was your answer?

The Witness: They do.

Q. Colored and white? Do Negroes and white come into Loveman's and purchase goods?

A. They do.

Q. Frequently?

A. They do.

Mr. Adams: That is all.

Redirect examination.

By Mr. Davis:

Q. I believe you were asked the question in substance so far as you know no one 'phoned the police. Do you have any personal knowledge on the subject of who, if anyone, did call the police?

A. No, I do not.

Q. You have no personal knowledge whatever on the subject?

A. No, sir, I do not have.

Q. He was talking about members of both races being invited into the store. Is it your information that members of both races are invited to eat on the mezzanine?

A. Not that I know of.

[fol. 32] Mr. Davis: That is all.

Recross examination.

By Mr. Adams:

Q. Do you know have they been told not to come and eat in the tearoom in Loveman's?

Mr. Davis: We object to that as incompetent, irrelevant, and it wouldn't make any difference what they have done in the past, but on this occasion,

Mr. Adams: Counsel asked if Loveman's had invited them to come and eat together on the mezzanine and I asked whether they have been told not to come and eat.

Mr. Davis: They were invited not to on this occasion at least.

The Court: Well let him answer it if he knows.

Q. Have they been invited not to eat there?

A. Well in my short time I have been there I have never, the policy of the store I do not know, I have never been informed in regard to that although on all of the occasions I visited the mezzanine I have never seen any colored eating on the mezzanine.

Q. You don't know if anybody at Loveman's called the City of Birmingham?

A. I do not know.

Q. Did you sign any complaint or any warrant for the arrest of these two defendants?

A. Not that I recall did I sign any.

Q. Your position is what?

A. Store protection or store detective in other words.

Q. That would come in your department?

A. Well to a certain extent, it would.

Q. You would be the person to do so?

Mr. Davis: We object to that.

The Court: To do what?

Mr. Adams: To sign a complaint or warrant or charge against anybody.

[fol. 33] The Court: He couldn't sign a warrant I am sure unless he has a deputy's commission.

Mr. Adams: Not as a police-officer.

The Court: Not as anybody. He just is without authority to sign a warrant.

Mr. Adams: Could he sign an affidavit?

The Court: Oh, anybody can do that.

Q. You did not sign an affidavit, did you?

A. I have not.

Mr. Adams: That is all.

Mr. Davis: That is all. The City rests if the Court pleases.

Mr. Shores: We rest and Your Honor we would like to file motions in both cases, motions to exclude. I want to point out in these two motions in addition to the other grounds there is no testimony that anybody warned the parties to move and that they remained after warning. Did Your Honor overrule the motion to exclude?

The Court: Yes, I thought we had stipulated we would have the same motions and the same demurrers in all of the cases.

Mr. Shores: You didn't stipulate the same ruling.

The Court: And the same ruling.

Mr. Adams: In some of the cases the evidence is not exactly the same and we reserve the right to make observations where it is not.

The Court: Of course you have a perfect right to do that but the stipulation is that the ruling will be the same in each of them up to now.

[fol. 34] Transcript of Sentencing (omitted in printing).

[fol. 39] Reporter's and Clerk's Certificates to foregoing transcript (omitted in printing).

[fol. 41]

IN THE COURT OF APPEALS OF ALABAMA

No. .....

ROY HUTCHINSON, Appellant,

vs.

THE CITY OF BIRMINGHAM, Appellee.

ASSIGNMENT OF ERRORS

The Appellant says that there is manifest error in the foregoing Transcript of the Record of the proceedings, had and done in the Honorable Circuit Court of Jefferson County, Alabama, to the hurt and prejudice of this appellant, and for error, assigns each the following separately and severally:

1. The Court erred in over-ruling Appellant's Motion to Strike the Complaint filed in this cause, to which ruling the Appellant took exceptions. (Tr. 2, 3, 8 & 16).

2. The Court erred in over-ruling the Appellant's Demurrers filed in this cause, to which the Appellant took exceptions. (Tr. 3, 4, 8 & 16).

3. The Court erred in over-ruling the Appellant's Motion to Exclude the Evidence filed in this cause, to which ruling Appellant took exceptions. (Tr. 5, 7, 8 & 19).

4. The Court erred in over-ruling Appellant's Motion for a New Trial. (Tr. 9, 10, 12 & 38).

Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, Jr., J. Richmond Pearson, Attorneys for Appellant.

Certificate of Service (omitted in printing).

[fol. 42]

IN THE COURT OF APPEALS OF THE STATE OF ALABAMA

..... JUDICIAL DEPARTMENT

October Term, 1960-61

6 Div. 798

ROY HUTCHINSON,

v.

CITY OF BIRMINGHAM.

Appeal from Jefferson Circuit Court.

November 2, 1960

Certificate Filed

January 30, 1961

Transcript Filed

April 18, 1961

Come the parties by attorneys, and argue and submit this cause for decision.

ORDER OF AFFIRMANCE—May 30, 1961

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed, on authority of Gober v. City of Birmingham 6th Division 797, Ala. App. Ms. It is also considered that the appellant pay the costs of appeal of this court and of the Circuit Court.

[fol. 43] Application for Rehearing and Order Overruling (omitted in printing).

[fol. 43a] Proceedings on Petition for Certiorari (omitted in printing).

[fol. 44]

IN THE SUPREME COURT OF ALABAMA

Sixth Division

No. .....

Ex Parte: Roy Hutchinson

ROY HUTCHINSON, Appellant,

vs.

CITY OF BIRMINGHAM, Appellee.

PETITION FOR CERTIORARI—Filed July 3, 1961

To the Honorable Chief Justice and Associate Justices of the Supreme Court of Alabama

1. Comes the Appellant, by and through his Attorneys, Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, Jr., and J. Richmond Pearson, and respectfully petitions this Honorable Court to review, revise, reverse and hold for naught that certain Judgment of the Court of Appeals, on to-wit: May 30, 1961, wherein Roy Hutchinson was Appellant and the City of Birmingham was Appellee, which Judgment affirms the Judgment of the Circuit Court of Jefferson County, Alabama.

2. Your petitioner avers that application to the Court of Appeals for a Rehearing of said cause and Brief in support thereof were duly filed by your petitioner within the time required by law, and that said application for rehearing was overruled by said Court of Appeals on the 20th day of June, 1961.

3. Your petitioner respectfully shows unto the Court that this cause arose from a complaint filed by the City of Birmingham, charging your petitioner with violating Section 1436 of the General City Code of Birmingham 1944, viz:

"Any person who enters into the dwelling house or goes or remains on the premises of another, after being warned not to do so, shall on conviction, be punished as provided in Section 4, provided that this Section shall not apply to police officers in discharge of official duties."

4. Your petitioner filed a Motion to Quash the Complaint and Demurrers to the Complaint, on grounds that the Complaint was so vague and indefinite as not to apprise the Appellant of what he was called upon to defend, and further, that the ordinance which formed the basis of the prosecution, as applied to appellant, constituted an abridgement of the privileges and immunities guaranteed by the Constitution of the United States and that the ordinance was unconstitutional on its face.

5. The Court overruled the Motion to Quash and the Demurrers, whereupon petitioner was tried without a jury, and was found guilty of Trespass after Warning, and fined One Hundred ($100.00) Dollars and costs, and sentenced to a term of Thirty (30) days of hard labor for the City of Birmingham.

6. Your petitioner filed a Motion to Exclude the Evidence, at the close of the city's case, which Motion was [fol. 45] denied. After Judgment and sentence, petitioner filed a Motion for a New Trial, which Motion was denied, and petitioner perfected his appeal.

7. Your petitioner further shows unto your Honors that the Court of Appeals erred in affirming and failing to reverse said cause, in the following ways, to-wit: The Court based its judgment in this cause, upon the opinion judgment rendered in the case of James Gober vs. City of Birmingham, Sixth Division-797, decided May 30, 1961, which case had a different factual situation from petitioner's case; and there was a different Proposition of Law involved in petitioner's case, not involved in case of Gober vs. City of Birmingham.

8. That the Propositions of Law involved, which petitioner claims should be reviewed and revised by this Court, are as follows:

A. That the Ordinance and Complaint, the basis of the prosecution, are unconstitutional on their face, that they are so vague, indefinite and uncertain as to constitute a deprivation of liberty, without due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

B. That the Ordinance and Complaint, the basis of the prosecution, as applied to petitioner, constitute an abridgement of the privileges and immunities, and a denial of the equal protection of the Laws, all in violation of the Fourteenth Amendment to the United States Constitution.

C. That to warrant a conviction, the evidence must identify the accused, as the person who committed the crime.

The Court of Appeals erred in failing to rule that the conviction of petitioner was a violation of due process of law, an abridgement of the privileges and immunities, equal protection of the law, and a violation of the Fourteenth Amendment to the Constitution of the United States.

The Court of Appeals erred in failing to rule that to warrant a conviction, the evidence must identify the accused as the person who committed the crime.

Wherefore, your petitioner most respectfully prays that a Writ of Certiorari be issued out of and under the Seal of this Court directed to the Court of Appeals of Alabama, commanding and requiring said Court to certify and send to this Court, on a day certain to be designated by this Court, a full and complete Transcript of Record, and all proceedings of said Court of Appeals of Alabama, in the Cause numbered and entitled aforesaid, to the end that this cause may be reviewed and determined by this Honorable Court, as provided by law and the rules and practice of this Court, and that this Court thereupon proceed to review and correct the errors complained of and to reverse the Judgment of the Court of Appeals or render such Judgment as said Court should have rendered.

Petitioner prays that this Honorable Court suggest and require the Court of Appeals to Stay or recall its Certificate of Affirmance of said cause, during the pendency of this petition.

[fol. 46] And petitioner prays for such other, further and additional relief in the premises, as to this Court may seem appropriate, and to which he may be entitled, and your petitioner will ever pray.

Respectfully submitted,

Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, J. Richmond Pearson, By Arthur D. Shores, Attorneys for Appellant.

Duly sworn to by Arthur D. Shores; jurat omitted in printing.

Certificate of Service (omitted in printing).

[fol. 47] Order Denying Petition for Writ of Certiorari (omitted in printing).

[fol. 48] Application for Rehearing (omitted in printing).

[fol. 49] Order Overruling Application for Rehearing (omitted in printing).

[fol. 50] Clerks' Certificates to foregoing transcript (omitted in printing).

[fol. 1]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA, IN AND FOR JEFFERSON COUNTY

No. 20783

THE CITY OF BIRMINGHAM,

vs.

ROBERT J. KING.

APPEAL BOND: (omitted in printing)

[fol. 2]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20783

CITY OF BIRMINGHAM, a Municipal Corporation, Plaintiff,

vs.

ROBERT J. KING, Defendant.

COMPLAINT—Filed October 10, 1960

Comes the City of Birmingham, Alabama, a municipal corporation, and complains that Robert J. King, within twelve months before the beginning of this prosecution and within the City of Birmingham or the police jurisdiction thereof, did go or remain on the premises of another, said premises being the area used for eating, drinking and dining purposes and located within the building commonly and customarily known as Loveman's Department Store, located at 216 North 19th Street, Birmingham, Alabama, after being warned not to do so, contrary to and in violation of Section 1436 of the General City Code of Birmingham of 1944.

Watts E. Davis, Attorney for City of Birmingham.

[File endorsement omitted]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20783

CITY OF BIRMINGHAM,

VS.

ROBERT J. KING.

MOTION TO STRIKE—Filed October 10, 1960

Comes now Robert J. King, defendant in this cause, and moves to strike the complaint in this cause, and as grounds for said Motion, sets out and assigns the following, separately and severally:

1. That the complaint, affidavit, etc., is not sworn to.

2. That the allegations of the said complaint are so vague and indefinite, as not to apprise this defendant of what he is called upon to defend.

3. That the ordinance or statute upon which is founded the complaint in this cause, as applied to this defendant, [fol. 3] as a citizen of the State of Alabama, and of the United States, constitutes an abridgment of the freedom of assembly, speech and liberties secured to the Defendant, by the Constitution and laws of the State of Alabama and the Fourteenth Amendment of the Constitution of the United States of America.

4. That the said ordinance or statute which is the basis for the affidavit, information or complaint in this cause, as applied to the defendant, constitutes an abridgment of privileges and immunities guaranteed defendant, as a citizen of the United States, in violation of the Constitution and laws of the State of Alabama, and of the Fourteenth Amendment of the United States Constitution.

5. That Section 824 of the General City Code of the City of Birmingham, as applied to this defendant, a Negro citizen of the United States, constitutes a denial of due process and equal protection of law, in violation of the

Fourteenth Amendment to the Constitution of the United States of America.

6. That the said affidavit, information or complaint, does not charge any offense, which is cognizable by this court.

Arthur D. Shores, J. Richmon Pearson, Orzell Billingsley, Jr., Peter A. Hall, Attorneys for Defendant.

[File endorsement omitted]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20783

CITY OF BIRMINGHAM,

vs.

ROBERT J. KING.

DEMURRERS—Filed October 10, 1960

Comes now Robert J. King, defendant in this cause, and demurs to the complaint in this cause, and to each and every count thereof, separately and severally, and as grounds for such demurrer sets out and assigns the following, separately and severally:

1. The affidavit or information which supports the com- [fol. 4] plaint in this cause, does not charge defendant with any offense under the Constitution and laws of the State of Alabama.

2. That the complaint, affidavit or information upon which this cause is based is insufficient to support prosecution of this cause, in that no offense is charged which is cognizable by this Honorable Court.

3. That the allegations of the complaint and each count thereof are so vague and indefinite as not to apprise this defendant of what he is called upon to defend.

4. That the ordinance, Section 1436 of the 1944 General City Code of Birmingham, Alabama, as applied to this defendant, is invalid in that it violates Section 4, Article 1, of the Constitution of Alabama, and the First and Fourteenth Amendments to the Constitution of the United States of America.

5. That Section 1436 of the 1944 General City Code of Birmingham, Alabama, which supports the complaint, affidavit or information in this cause, as applied to this defendant, a citizen of the State of Alabama and of the United States, constitutes an abridgment of freedom of speech and assembly violative of rights and liberties secured the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

6. That the aforesaid ordinance as applied to defendant, is unconstitutional on its face in that it is so vague as to constitute a deprivation of liberty without due process of law in violation of the provisions of the Fourteenth Amendment to the United States Constitution.

7. That the said Ordinance or Statute in this case, as applied to defendant, constitutes an abridgment of privileges and immunities guaranteed defendant as a citizen of the United States, in violation of the Fourteenth Amendment to the United States Constitution.

8. That the said Ordinance, as applied to defendant, constitutes a denial of equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States of America.

Arthur D. Shores, Orzell Billingsley, Jr., J. Richmond Pearson, Peter A. Hall, Oscar W. Adams, Jr., Attorneys for Defendant.

[File endorsement omitted]

[fol. 5]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20783

CITY OF BIRMINGHAM, Plaintiff,

versus

ROBERT J. KING, Defendant.

MOTION TO EXCLUDE THE EVIDENCE—Filed October 10, 1960

1. The complaint charging defendant, a Negro, with violation of 1436 of the General City Code of Birmingham of 1944, to-wit, an alleged trespass upon land after being forbidden to enter or remain after told to leave is invalid in that the evidence establishes merely that defendant was peacefully upon the premises of Loveman's, an establishment performing an economic function invested with the public interest, as a customer, visitor, business guest or invitee, and there is no basis for the charge recited by the complaint other than an effort to exclude defendant from Loveman's Eating Facilities because of his race or color; defendant, at the same time is excluded from equal service at the preponderant number of other similar eating establishments in Birmingham, Alabama; thereby depriving him of liberty without due process of law and of the equal protection of the laws secured by the 14th Amendment of the United States Constitution.

2. The evidence offered against defendant, a Negro, in support of the complaint charging him with violation of trespass upon land after being forbidden to enter establishes that he was, at the time of arrest and at all times covered by the charge, in peaceful exercise of constitutional rights to assemble with others for the purpose of speaking and protesting against the practice, custom and usage of racial discrimination in Loveman's, an establishment performing an economic function invested with the public

interest; that defendant peacefully was attempting to obtain service in the facilities of Loveman's in the manner of white persons similarly situated, and at no time was defendant defiant or in breach of the peace and was at all times upon an area essentially public; wherefore defendant has been denied rights secured by the due process and equal protection clauses of the 14th Amendment of the United States Constitution.

3. The evidence establishes that prosecution of defendant was procured for the purpose of preventing him from engaging in peaceful assembly with others for the purpose of speaking and otherwise peacefully protesting in public places the refusal of the preponderant number of stores, facilities and accommodations open to the public in [fol. 6] Birmingham, Alabama to permit defendant, a Negro, and other members of defendant's race from enjoying the access to such stores, facilities and accommodations afforded members of other races; and that by this prosecution, prosecuting witnesses and arresting officers are attempting to employ the aid of the Court to enforce a racially discriminatory policy contrary to the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States.

4. The evidence against defendant, a Negro, in support of the complaint charging him with violation of trespass upon land after being forbidden to enter clearly indicates that defendant at the time of his arrest, had accepted an invitation to enter and purchase articles in Loveman's, a store open to the public, but had not been allowed to obtain food service on the same basis as that offered white persons, because of defendant's race or color; and, that in furtherance of this racially discriminatory practice of Loveman's, defendant was arrested on the basis of race or color, under color of law, to enforce racially discriminatory policy, thereby violating defendant's rights under the equal protection and due process clauses of the 14th Amendment of the United States Constitution.

5. The statute or ordinance (1436 of the General City Code of Birmingham of 1944) under which defendant, a

Negro, was arrested and charged is unconstitutional on its face by making it a crime to be on public property after being asked to leave by an individual at such individual's whim, in that said statute does not require that the person making the demand to leave present documents or other evidence of possessory right sufficient to apprise defendant of the validity of the demand to leave, all of which renders the statute so vague and uncertain as applied to defendant as to violate his rights under the due process clause of the 14th Amendment of the United States Constitution.

6. Section 1436 of the General City Code of Birmingham of 1944 under which defendant, a Negro, was arrested and charged with violation of trespass upon land after being forbidden to enter is on the evidence unconstitutional as applied to defendant in that it makes it a crime to be on property open to the public after being asked to leave, because of race or color, in violation of defendant's rights under the due process and equal protection clauses of the 14th Amendment of the United States Constitution.

7. The evidence against defendant, a Negro, establishes that he, at the time of arrest and all times covered by the [fol. 7] complaint, was a member of the public, peaceably attempting to use a publicly owned facility, to-wit: and from which defendant was barred because of his race or color; that such denial was in accordance with a policy, custom and usage of Loveman's, of operating such facilities and services on a racially segregated basis, which policy, custom and usage violates the due process and equal protection clauses of the 14th Amendment of the Constitution of the United States.

8. The evidence offered against the defendant, a Negro, establishes that at the time of arrest and all times covered by the complaint he was a member of the public, attempting to use a facility, Loveman's, open to the public, which was denied to him solely because of race or color; that Loveman's, was and is offering, for a price, to serve all members of the public with food; that this public facility Loveman's, is, along with others of a similar nature, per-

forming a necessary service for the public, which in fact, would have to be provided by the state if Loveman's and other like facilities were all to withdraw said services; that having determined to offer said valuable service to the public, Loveman's is required to provide such service in the manner of state operated facilities of a like nature, to wit: That ..... may not segregate or exclude defendant on the ground of race or color, in violation of the due process and equal protection clauses of the 14th Amendment of the United States Constitution.

Arthur D. Shores, J. Richmond Pearson, Orzell Billingsley, Jr., Attorneys for Defendant.

[File endorsement omitted]

[fol. 8]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

Appealed from Recorder's Court

(Trespass After Warning)

Honorable Geo. Lewis Bailes, Judge Presiding

CITY OF BIRMINGHAM,

VS.

ROBERT J. KING.

JUDGMENT ENTRY—October 10, 1960

This the 10th day of October, 1960, came Wm. C. Walker, who prosecutes for the City of Birmingham, and also came the defendant in his own proper person and by attorney, and the City of Birmingham files written Complaint in this cause, and the defendant being duly arraigned upon said Complaint for his plea thereto says that he is not guilty; and defendant files motion to strike, and said motion being considered by the Court, it is ordered and ad-

judged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion the defendant hereby duly and legally excepts; and the defendant files demurrers, and said demurrers being considered by the Court, it is ordered and adjudged by the Court that said demurrers be and the same are hereby overruled, to which action of the Court in overruling said demurrers the defendant hereby duly and legally excepts; and the defendant files motion to exclude the evidence, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion, the defendant hereby duly and legally excepts; and on this the 11th day of October, 1960, the Court finds the defendant guilty as charged in the Complaint and thereupon assessed a fine of One Hundred ($100.00) dollars and costs against said defendant. It is therefore considered by the Court, and it is the judgment of the Court that said defendant is guilty as charged in said Complaint, and that he pay a fine of One Hundred ($100.00) dollars and costs of this cause.

And said defendant being now in open Court, and having presently failed to pay the fine of $100.00 and the costs of $5.00 accrued in the Recorder's Court of the City of Birmingham, or to confess judgment with good and sufficient security for the same, it is therefore considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said Robert J. King, perform hard labor for the City of Birmingham for fifty-two days, because of his failure to pay said fine and costs of $5.00 accrued in said Recorder's Court, or to confess judgment with good and sufficient security therefor.

[fol. 9] It is further considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said Robert J. King, perform additional hard labor for the City of Birmingham for thirty days, as additional punishment in this cause.

And the costs legally taxable against the defendant in this cause amounting to forty-eight and 75/100 ($48.75)

dollars, not being presently paid or secured, and $4.00 of said amount being State Trial Tax, $3.00, and Law Library Tax, $1.00, leaving forty-four and 75/100 ($44.75) dollars taxable for sentence, it is ordered by the Court that said defendant perform additional hard labor for the County for sixty days, at the rate of 75 cents per day to pay said costs. It is further ordered by the Court that after the sentence for the City of Birmingham has expired, that the City authorities return the defendant to the County authorities to execute said sentence for costs.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in this behalf expended for feeding the defendant while in jail, for which let execution issue.

And on this the 11th day of October, 1960, the defendant files motion for a new trial in this cause, and said motion coming on to be heard and determined by the Court, it is ordered by the Court, and it is the judgment of the Court that said motion be and the same is hereby overruled.

And notice of appeal being given, and it appearing to the Court that, upon the trial of this cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Appeals of Alabama, it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at $300.00, conditioned as required by Law.

[fol. 10]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20783

CITY OF BIRMINGHAM, a Municipal Corporation, Plaintiff,

vs.

ROBERT J. KING, Defendant.

MOTION FOR A NEW TRIAL—Filed November 28, 1960

Now comes the defendant, in the above styled cause, and with leave of the Court, first had and obtained, and moves this Honorable Court to set aside the verdict and judgment rendered on to wit the 11th day of October, 1960, and that this Honorable Court will grant the defendant a new trial, and as grounds for said Motion sets out and assigns the following separately and severally:

1. That the Judgment of the Court in said case, is contrary to the law.

2. For that the Judgment of the Court is contrary to the facts.

3. For that the Judgment of the Court is contrary to the law in the case.

4. In that the Judgment of the Court is not sustained by the great preponderance of the evidence in the case.

5. For that the Judgment of the Court is not sustained by the great preponderance of the evidence in the case.

6. For that the Judgment of the Court is so unfair, as to constitute a gross miscarriage of justice.

7. For that the sentence is excessive.

8. For that the Court erred in over-ruling objections, by the defendant to the introduction of evidence on behalf of the City of Birmingham, Alabama, in this case.

9. For the Court erred in overruling objections by the defendant to the introduction of evidence, which was so biased and prejudiced that the defendant was denied the right of a fair and impartial trial.

10. For the Court erred in overruling objections by the defendant to the introduction of evidence, which was so biased and prejudiced that the defendant was denied the right of a fair and impartial trial.

11. The Court erred in overruling defendant's demurrers filed in this cause.

12. The Court erred in overruling the defendant's Motion to Strike the Complaint in this cause.

[fol. 11] 13. The Court erred in finding the defendant guilty of violating the laws or ordinances of the City of Birmingham, Alabama, in that the laws or ordinances, under which this defendant was charged and convicted, and as applied to this defendant, constituted an abridgement of freedom of speech violative of rights and liberties secured to the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

14. That the Court erred in refusing to find that the ordinance under which this defendant was being tried, as applied to this defendant, constituted a denial of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

15. That the Court erred in finding the defendant guilty of violating the laws or ordinances of the City of Birmingham, Alabama, in that the laws or ordinances under which this defendant was charged and convicted, and as applied to this defendant, constituted a deprivation of liberty, without due process of law, in violation of the Constitution of the State of Alabama, and the provisions of the Fourteenth Amendment to the United States Constitution.

16. The Court erred in overruling defendant's Motion to exclude the evidence in this case.

17. That it appeared from the evidence that no owner of the premises involved, had caused the arrest and prosecution of the defendant, but that such arrest was procured by the officials of the City of Birmingham, Alabama, without first having a complaint from such owner, or other person in charge of such premises.

18. For that it appears from the evidence that the defendant was not prosecuted by the owner of private property, as provided for by the pertinent laws or ordinances of the City of Birmingham, but by police officials.

19. For that it appears from the evidence affirmatively that no owner or other person in charge of the premises involved, or otherwise, having authority to do so, procured the arrest of the defendant or signed a complaint or swore out a warrant against defendant for trespass on private property.

20. For that it affirmatively appears that the defendant was not requested to leave the premises of the store involved, but was only told to go elsewhere in the store.

[fol. 12] Arthur D. Shores, Orzell Billingsley, Jr., Peter A. Hall, J. Richmond Pearson, Oscar W. Adams, Jr., Attorneys for Defendant.

ORDER OVERRULING

The foregoing Motion being presented in open court, this the 11th day of October, 1960; the same being considered and understood, the Court is of the opinion that the same should be overruled.

Geo. Lewis Bailes, Circuit Judge.

[File endorsement omitted]

Appeal Bond to Court of Appeals (omitted in printing).

[fol. 14]

TRANSCRIPT OF EVIDENCE—October 10, 1960
(omitted in printing)

COUNSEL'S NOTE RE RECORD

The parties stipulate that the trial transcript in the *King* case is identical to that in the *Hutchinson* case.

[fol. 34]

TRANSCRIPT OF SENTENCING (omitted in printing)

[fol. 39] Reporter's and Clerk's Certificates to foregoing transcript (omitted in printing).

[fol. 41]

IN THE COURT OF APPEALS OF ALABAMA

ROBERT J. KING, Appellant,

vs.

THE CITY OF BIRMINGHAM, Appellee.

ASSIGNMENT OF ERRORS

The Appellant says that there is manifest error in the foregoing Transcript of the Record of the proceedings, had and done in the Honorable Circuit Court of Jefferson County, Alabama, to the hurt and prejudice of this appellant, and for error, assigns each of the following separately and severally:

1. The Court erred in overruling Appellant's Motion to Strike the Complaint filed in this cause, to which ruling the Appellant took exceptions. (Tr. 2, 3, 8 & 16)

2. The Court erred in overruling the Appellant's Demurrers filed in this cause, to which the appellant took exceptions. (Tr. 3, 4, 8 & 16)

3. The Court erred in overruling the Appellant's Motion to Exclude the Evidence filed in this cause, to which ruling Appellant took exceptions. (Tr. 5, 7, 8 & 19)

4. The Court erred in overruling Appellant's Motion for a New Trial. (Tr. 9, 10, 12 & 38)

Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, J. Richmond Pearson, Attorneys for Appellant.

Certificate of Service (omitted in printing).

[fol. 42]

IN THE COURT OF APPEALS OF THE STATE OF ALABAMA

JUDICIAL DEPARTMENT

October Term, 1960-61

6 Div. 799

ROBERT J. KING,

v.

CITY OF BIRMINGHAM.

Appeal from Jefferson Circuit Court

November 2, 1960

Certificate Filed

January 30, 1961

Transcript Filed

April 18, 1961

Come the parties by attorneys, and argue and submit this cause for decision.

ORDER OF AFFIRMANCE—May 30, 1961

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court, there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed, on authority of Gober v. City of Birmingham, 6th Division 797, Ala. App. Ms. It is also considered that the appellant pay the costs of appeal of this court and of the Circuit Court.

[fol. 43] Application for Rehearing and Order Overruling (omitted in printing).

[fol. 43a] Proceedings on Petition for Certiorari (omitted in printing).

[fol. 44] Petition for Certiorari (omitted in printing).

COUNSEL'S NOTE RE RECORD

The parties stipulate that the petition filed in the Alabama Supreme Court in the *King* case is identical to that filed in the *Hutchinson* case.

[fol. 48] Order Denying Petition for Writ of Certiorari (omitted in printing).

[fol. 49] Application for Rehearing (omitted in printing).

[fol. 50] Order Overruling Application for Rehearing (omitted in printing).

[fol. 51] Clerks' Certificates to foregoing transcript (omitted in printing).

[fol. 1]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA
IN AND FOR JEFFERSON COUNTY

No. 20784

THE CITY OF BIRMINGHAM

vs.

ROBERT L. PARKER, JR.

Appeal Bond (omitted in printing).

[fol. 2] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20784

CITY OF BIRMINGHAM, a Municipal Corporation, Plaintiff,

vs.

ROBERT L. PARKER, JR., Defendant.

COMPLAINT—Filed October 10, 1960

Comes the City of Birmingham, Alabama, a municipal corporation, and complains that Robert L. Parker, Jr., within twelve months before the beginning of this prosecution and within the City of Birmingham or the police jurisdiction thereof, did go or remain on the premises of another, said premises being the area used for eating, drinking and dining purposes and located within the building commonly and customarily known as J. J. Newberry Co., 200 North 19th Street, Birmingham, Alabama, after being warned not to do so, contrary to and in violation of Section 1436 of the General City Code of Birmingham of 1944.

Watts E. Davis, Attorney for City of Birmingham.

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20784

CITY OF BIRMINGHAM,

vs.

ROBERT L. PARKER.

MOTION TO STRIKE—Filed October 10, 1960

Comes now Robert L. Parker, defendant in this cause, and moves to strike the complaint in this cause, and as grounds for said Motion, sets out and assigns the following, separately and severally:

1. That the complaint, affidavit, etc., is not sworn to.

2. That the allegations of the said complaint are so vague and indefinite, as not to apprise this defendant of what he is called upon to defend.

3. That the ordinance or statute upon which is founded the complaint in this cause, as applied to this defendant, as a citizen of the State of Alabama, and of the United States, constitutes an abridgment of the freedom of assembly, speech and liberties secured to the Defendant, by the Con-
[fol. 3] stitution and laws of the State of Alabama and the Fourteenth Amendment of the Constitution of the United States of America.

4. That the said ordinance or statute which is the basis for the affidavit, information or complaint in this cause, as applied to the defendant, constitutes an abridgment of privileges and immunities guaranteed defendant, as a citizen of the United States, in violation of the Constitution and laws of the State of Alabama, and of the Fourteenth Amendment of the United States Constitution.

5. That Section 824 of the General City Code of the City of Birmingham, as applied to this defendant, a Negro citizen of the United States, constitutes a denial of due process and equal protection of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

6. That the said affidavit, information or complaint, does not charge any offense, which is cognizable by this court.

Arthur D. Shores, J. Richmond Pearson, Orzell Billingsley, Jr., Peter A. Hall, Attorneys for Defendant.

[File endorsement omitted]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20784

CITY OF BIRMINGHAM,

vs.

ROBERT L. PARKER.

DEMURRERS—Filed October 10, 1960

Comes now Robert L. Parker, defendant in this cause, and demurs to the complaint in this cause, and to each and every count thereof, separately and severally, and as grounds for such demurrer sets out and assigns the following, separately and severally:

1. The affidavit or information which supports the complaint in this cause, does not charge defendant with any offense under the Constitution and laws of the State of Alabama.

2. That the complaint, affidavit or information upon which this cause is based is insufficient to support prosecution of this cause, in that no offense is charged which is cognizable by this Honorable Court.

[fol. 4] 3. That the allegations of the complaint and each count thereof are so vague and indefinite as not to apprise this defendant of what he is called upon to defend.

4. That the ordinance, Section 1436 of the 1944 General City Code of Birmingham, Alabama, as applied to this defendant, is invalid in that it violates Section 4, Article 1, of the Constitution of Alabama, and the First and Fourteenth Amendments to the Constitution of the United States of America.

5. That Section 1436 of the 1944 General City Code of Birmingham, Alabama, which supports the complaint, affidavit or information in this cause, as applied to this defendant, a citizen of the State of Alabama and of the United States, constitutes an abridgment of freedom of speech and assembly violative of rights and liberties secured the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

6. That the aforesaid ordinance as applied to defendant, is unconstitutional on its face in that it is so vague as to constitute a deprivation of liberty without due process of law in violation of the provisions of the Fourteenth Amendment to the United States Constitution.

7. That the said Ordinance or Statute in this case, as applied to defendant, constitutes an abridgment of privileges and immunities guaranteed defendant as a citizen of the United States, in violation of the Fourteenth Amendment to the United States Constitution.

8. That the said Ordinance, as applied to defendant, constitutes a denial of equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States of America.

Arthur D. Shores, Orzell Billingsley, Jr., J. Richmond Pearson, Peter A. Hall, Oscar W. Adams, Jr., Attorneys for Defendant.

[File endorsement omitted]

[fol. 5]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20784

CITY OF BIRMINGHAM, Plaintiff,

versus

ROBERT L. PARKER, Defendant.

MOTION TO EXCLUDE THE EVIDENCE—Filed October 10, 1960

1. The complaint charging defendant, a Negro, with violation of 1436 of the General City Code of Birmingham

of 1944, to-wit, an alleged trespass upon land after being forbidden to enter or remain after told to leave is invalid in that the evidence establishes merely that defendant was peacefully upon the premises of Newberry's, an establishment performing an economic function invested with the public interest, as a customer, visitor, business guest or invitee, and there is no basis for the charge recited by the complaint other than an effort to exclude defendant from Newberry's First Floor Eating Facilities because of his race or color; defendant, at the same time is excluded from equal service at the preponderant number of other similar eating establishments in Birmingham, Alabama; thereby depriving him of liberty without due process of law and of the equal protection of the laws secured by the 14th Amendment of the United States Constitution.

2. The evidence offered against defendant, a Negro, in support of the complaint charging him with violation of trespass upon land after being forbidden to enter establishes that he was, at the time of arrest and at all times covered by the charge, in peaceful exercise of constitutional rights to assemble with others for the purpose of speaking and protesting against the practice, custom and usage of racial discrimination in Newberry's, an establishment performing an economic function invested with the public interest; that defendant peacefully was attempting to obtain service in the facilities of Newberry's in the manner of white persons similarly situated, and at no time was defendant defiant or in breach of the peace and was at all times upon an area essentially public, wherefore defendant has been denied rights secured by the due process and equal protection clauses of the 14th Amendment of the United States Constitution.

3. The evidence establishes that prosecution of defendant was procured for the purpose of preventing him from engaging in peaceful assembly with others for the purpose of speaking and otherwise peacefully protesting in public places the refusal of the preponderant number of stores, facilities and accommodations open to the public in Bir- [fol. 6] mingham, Alabama to permit defendant, a Negro, and other members of defendant's race from enjoying the

access to such stores, facilities and accommodations afforded members of other races; and that by this prosecution, prosecuting witnesses and arresting officers are attempting to employ the aid of the Court to enforce a racially discriminatory policy contrary to the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States.

4. The evidence against defendant, a Negro, in support of the complaint charging him with violation of trespass upon land after being forbidden to enter clearly indicates that defendant at the time of his arrest, had accepted an invitation to enter and purchase articles in Newberry's, a store open to the public, but had not been allowed to obtain food service on the same basis as that offered white persons, because of defendant's race or color; and, that in furtherance of this racially discriminatory practice of Newberry's, defendant was arrested on the basis of race or color, under color of law, to enforce racially discriminatory policy, thereby violating defendant's rights under the equal protection and due process clauses of the 14th Amendment of the United States Constitution.

5. The statute or ordinance (1436 of the General City Code of Birmingham of 1944) under which defendant, a Negro, was arrested and charged is unconstitutional on its face by making it a crime to be on public property after being asked to leave by an individual at such individual's whim, in that said statute does not require that the person making the demand to leave present documents or other evidence of possessory right sufficient to apprise defendant of the validity of the demand to leave, all of which renders the statute so vague and uncertain as applied to defendant as to violate his rights under the due process clause of the 14th Amendment of the United States Constitution.

6. Section 1436 of the General City Code of Birmingham of 1944 under which defendant, a Negro, was arrested and charged with violation of trespass upon land after being forbidden to enter is on the evidence unconstitutional as applied to defendant, in that it makes it a crime to be on property open to the public after being asked to leave,

because of race or color, in violation of defendant's rights under the due process and equal protection clauses of the 14th Amendment of the United States Constitution.

7. The evidence against defendant, a Negro, establishes that he, at the time of arrest and all times covered by the [fol. 7] complaint, was a member of the public, peaceably attempting to use a publicly owned facility, to-wit: Newberry's and from which defendant was barred because of his race or color; that such denial was in accordance with a policy, custom and usage of Newberry's, of operating such facilities and services on a racially segregated basis, which policy, custom and usage violates the due process and equal protection clauses of the 14th Amendment of the Constitution of the United States.

8. The evidence offered against the defendant, a Negro, establishes that at the time of arrest and all times covered by the complaint he was a member of the public, attempting to use a facility, Newberry's, open to the public, which was denied to him solely because of race or color; that Newberry's was and is offering, for a price, to serve all members of the public with food; that this public facility Newberry's, is, along with others of a similar nature, performing a necessary service for the public, which in fact, would have to be provided by the state if Newberry's and other like facilities were all to withdraw said service; that having determined to offer said value service to the public, Newberry's is required to provide such service in the manner of state operated facilities of a like nature, to-wit; That Newberry's may not segregate or exclude defendant on the ground of race or color, in violation of the due process and equal protection clauses of the 14th Amendment of the United States Constitution.

Arthur D. Shores, Oscar W. Adams, Jr., Orzell Billingsley, Jr., Peter A. Hall, Attorneys for Defendant.

[File endorsement omitted]

[fol. 8]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

Appealed from Recorder's Court

(Trespass After Warning)

Honorable Geo. Lewis Bailes, Judge Presiding

CITY OF BIRMINGHAM,

vs.

ROBERT L. PARKER JR.

JUDGMENT ENTRY—October 10, 1960

This the 10th day of October, 1960, came Wm. C. Walker, who prosecutes for the City of Birmingham, and also came the defendant in his own proper person and by attorney, and the City of Birmingham files written Complaint in this cause, and the defendant being duly arraigned upon said Complaint for his plea thereto says that he is not guilty; and defendant files motion to strike, and said motion being considered by the Court, and it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion the defendant duly and legally excepts; and the defendant files demurrers, and said demurrers being considered by the Court, it is ordered and adjudged by the Court that said demurrers be and the same are hereby overruled, to which action of the Court in overruling said demurrers the defendant hereby duly and legally excepts; and the defendant files motion to exclude the evidence, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion, the defendant hereby duly and legally excepts; and on this the 11th day of October, 1960, the Court finds the defendant guilty as charged in the Complaint and thereupon assessed a fine of One Hundred ($100.00) dollars and

costs against said defendant. It is therefore considered by the Court, and it is the judgment of the Court that said defendant is guilty as charged in said Complaint, and that he pay a fine of One Hundred ($100.00) dollars and costs of this cause.

And said defendant being now in open Court, and having presently failed to pay the fine of $100.00 and the costs of $5.00 accrued in the Recorder's Court of the City of Birmingham, or to confess judgment with good and sufficient security for the same, it is therefore considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said Robert L. Parker Jr., perform hard labor for the City of Birmingham for fifty-two days, because of his failure to pay said fine and costs of $5.00 accrued in said Recorder's Court, or to confess judgment with good and sufficient security therefor.

[fol. 9] It is further considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said Robert L. Parker, Jr., perform additional hard labor for the City of Birmingham for thirty days, as additional punishment in this cause.

And the costs legally taxable against the defendant in this cause amounting to fifty and 25/100 ($50.25) dollars, not being presently paid or secured, and $4.00 of said amount being State Trial Tax, $3.00, and Law Library Tax, $1.00, leaving forty-six and 25/100 ($46.25) dollars taxable for sentence, it is ordered by the Court that said defendant perform additional hard labor for the County for sixty-two days, at the rate of 75¢ per day to pay said costs. It is further ordered by the Court that after the sentence for the City of Birmingham has expired, that the City authorities return the defendant to the County authorities to execute said sentence for costs.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in this behalf expended for feeding the defendant while in jail, for which let execution issue.

And on this the 11th day of October, 1960, the defendant files motion for a new trial in this cause, and said motion coming on to be heard and determined by the Court, it is ordered by the Court, and it is the judgment of the Court that said motion be and the same is hereby overruled.

And notice of appeal being given, and it appearing to the Court that, upon the trial of this cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Appeals of Alabama, it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at $300.00, conditioned as required by Law.

[fol. 10]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20784

CITY OF BIRMINGHAM, a Municipal Corporation, Plaintiff,

vs.

ROBERT L. PARKER, Defendant.

MOTION FOR A NEW TRIAL—Filed October 11, 1960

Now comes the defendant, in the above styled cause and with leave of the Court, first had and obtained, and moves this Honorable Court to set aside the verdict and judgment rendered on to-wit, the 11th day of October, 1960, and that this Honorable Court will grant the defendant a new trial, and as grounds for said motion sets out and assigns the following, separately and severally:

1. That the judgment of the Court in said case is contrary to the law.

2. For that the judgment of the Court is contrary to the facts.

3. For that the judgment of the Court is contrary to the law in the case.

4. In that the judgment of the Court is not sustained by the great preponderance of the evidence in the case.

5. For that the judgment of the Court is not sustained by the great preponderance of the evidence in the case.

6. For that the judgment of the Court is so unfair, as to constitute a gross miscarriage of justice.

7. For that the sentence is excessive.

8. For that the Court erred in overruling objections, by the defendant to the introduction of evidence offered on behalf of the City of Birmingham, Alabama, in this case.

9. For the Court erred in overruling objections by the defendant to the introduction of evidence which was so biased and prejudiced that the defendant was denied the right of a fair and impartial trial.

10. The court erred in overruling defendant's demurrers filed in this cause.

11. The Court erred in overruling the defendant's Motion to Strike the Complaint in this cause.

12. The Court erred in finding the defendant guilty of [fol. 11] violating the laws or ordinances of the City of Birmingham, Alabama; in that the laws or ordinances, under which this defendant was charged and convicted, and as applied to this defendant, constituted an abridgement of freedom of speech violative of rights and liberties secured to the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

13. That the Court erred in refusing to find that the ordinance under which this defendant was being tried, as applied to this defendant, constituted a denial of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

14. That the Court erred in finding the defendant guilty of violating the laws or ordinances of the City of Birmingham, Alabama, in that the laws or ordinances under which this defendant was charged and convicted, and as applied to this defendant, constituted a deprivation of liberty without due process of law, in violation of the Constitution of the State of Alabama, and the provisions of the Fourteenth Amendment to the United States Constitution.

15. The Court erred in overruling defendant's Motion to exclude the evidence in this cause.

16. That it appeared from the evidence that no owner of the premises involved had caused the arrest and prosecution of the defendant, but that such arrest was procured by the officials of the City of Birmingham, Alabama, without first having a complaint from such owner, or other person in charge of such premises.

17. For that it appears from the evidence that the defendant was not prosecuted by the owner of private property, as provided for by the pertinent laws or ordinances of the City of Birmingham, but by police officials.

18. For that it appears from the evidence affirmatively that no owner or other person in charge of the premises involved, or otherwise, having authority to do so, procured the arrest of the defendant or signed a complaint or swore out a warrant against the defendant for trespass on privat property.

19. For that it affirmatively appears that the defendant was not requested to leave the premises of the store involved, but was only told to go elsewhere in said store.

Oscar W. Adams, Jr., Arthur D. Shores, Orzell Bill-
[fol. 12] ingsley, Jr., J. Richmond Pearson, Peter
A. Hall, Attorneys for Defendant.

ORDER OVERRULING

The foregoing Motion being presented in open Court, this the 11th day of October, 1960; the same being considered and understood, the Court is of the opinion that the same should be overruled.

It is therefore, Ordered, Adjudged and Decreed that the said Motion is hereby overruled.

Geo. Lewis Bailes, Circuit Judge.

[File endorsement omitted]

Appeal Bond to Court of Appeals (omitted in printing).

[fol. 14]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA
IN AND FOR JEFFERSON COUNTY

No. 20784

THE CITY OF BIRMINGHAM, a Municipal Corporation,

versus

ROBERT L. PARKER, JR.

Birmingham, Alabama

Transcript of Evidence—October 10, 1960

BEFORE: Honorable George L. Bailes, Judge.

APPEARANCES:

Mr. Watts E. Davis, for the City.

Messrs. A. D. Shores, Orzell Billingsley, Jr., Peter A. Hall, Oscar W. Adams, Jr., J. Richmond Pearson, for the Defendant.

[fol. 16] Proceedings

Mr. Billingsley: Your Honor, we file the same motion to strike for the defendants and demurrer with the stipula-

tion we will have the same ruling as in the first cases and an exception.

The Court: Yes; that will take care of it.

Mr. Davis: Mr. Myers.

B. R. Myers, called as a witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Davis:

Q. Will you please state your full name?

A. B. R. Myers.

Q. By whom are you employed, Mr. Myers?

A. The City of Birmingham.

Q. Are you a Police Officer?

A. Yes, sir.

Q. And were you a police officer on March 31, 1960?

A. Yes, sir.

Q. At or about 10:30 on the morning of March 31, did you have occasion to go to Newberry's Store?

A. I did.

Q. Is that in the City of Birmingham?

A. Yes, sir.

Q. Second Avenue and 19th Street, is that correct?

A. Yes, sir.

Q. What part of the store did you go to, Mr. Myers?

A. First floor.

Q. Did you visit the eating area?

A. Yes, sir.

Q. Did you find anything out of the ordinary there at the time?

[fol. 17] A. Two colored males were sitting at the lunch counter.

Q. Do you recall who those two males were?

A. William West and Robert Parker.

Q. Do you see them here in the Courtroom?

A. Yes, sir.

Q. Would you point to them, please, sir?

A. William West with the green coat and Parker in the dark coat, behind the attorneys.

Q. Those are the two boys sitting between counsel at the counsel table?

A. Yes, sir.

Q. Did you have any conversation with either of these two defendants on that occasion?

A. No conversation, no, sir.

Q. Did they have any conversation with anyone employed by Newberry's Store in your presence there on that occasion?

A. Not in my presence, no, sir.

Q. Did you place them under arrest?

A. I did.

Q. Were they told what they were arrested for?

A. They were.

Mr. Davis: That is all.

Cross examination.

By Mr. Hall:

Q. What caused you to go to Loveman's on the morning of 31st of March?

A. It was not Loveman's, Newberry's.

Q. I am sorry.

A. I received a call on the radio.

Q. That came from headquarters?

A. Yes, sir.

Q. When you got to the store you proceeded immediately to the eating counter?

A. Through the front door. The lunch counter is right at [fol. 18] the front door.

Q. Did you consult with any of the store officials at all?

A. I did not personally.

Q. Did you have occasion to talk with any of the store officials there at Newberry's?

A. I did not.

Mr. Davis: I didn't hear you.

The Witness: I did not.

Q. What occasioned the arrest of these two boys Parker and West, why did you arrest them?

A. Trespassing after warning.

Q. Why did you do it? Did you decide they were trespassing after warning?

A. I did not.

Q. Who did?

A. It was my understanding my partner had received a complaint from Mr. Stallings.

Q. I want to know who you received one from?

A. I didn't receive one personally.

Q. What occasioned the arrest? You did place them under arrest, didn't you at that time?

A. Yes.

Q. Why?

A. Because they had been warned to leave the lunch counter.

Q. How do you know?

Mr. Davis: We object to that, if the Court pleases, to arguing with the witness. He has already answered.

Mr. Hall: If Your Honor pleases, we are not arguing. We are trying to get a material aspect of the case. I understand that somebody who owned some property claims this defendant refused to leave after they were warned to do so and an official of the City of Birmingham then arrested them and they are being tried. The officer has stated nobody complained to him: I want to know who did complain and where?

[fol. 19] Mr. Davis: I believe the record did show he received a report by radio to go to Newberry's to make an arrest.

Mr. Hall: If Your Honor pleases counsel is testifying. The officer didn't testify to that. He said he got an order on the radio to go down to Newberry's. Now if he did get a complaint by radio we would like for him to say so on the stand. We want to know why he arrested the two boys at the time that he did.

The Court: I don't think you can properly go into mental processes, but you can ask him what he said and what was said to him.

Q. No official at Newberry's Store—

The Court: I don't know that.

Mr. Hall: If Your Honor pleases, that was addressed to the witness.

Q. Officer Myers, did I understand you to say that no official at Newberry's complained to you?

A. I did not receive the complaint personally.

Q. But you were the arresting officer?

A. One of the arresting officers.

Q. Did you know of any complaint at that time?

A. I did.

Q. You did?

A. Yes.

Q. How did you know that?

A. Officer Stoddard had received a complaint.

Q. From whom?

A. Mr. Stallings.

Q. Who is Stallings?

A. At Newberry's Department Store.

Q. I beg your pardon?

A. At Newberry's Department Store.

Q. Is he the Manager there?

A. I don't know what his capacity is.

Q. You don't know he is employed there?

[fol. 20] A. It was my understanding that he was.

Q. You don't know whether he is employed or not?

A. I don't know.

Mr. Hall: That is all.

Mr. Davis: Mrs. Gibbs.

Mr. Shores: Your Honor, I believe we asked for the rule when we started?

Mr. Davis: That was in another case.

Mr. Shores: We would like to have it.

The Court: You may invoke the rule.

(Witnesses placed under the rule.)

Mr. Hall: If Your Honor please, may we at this time ask for the rule in all of the cases? We were under the impression that the rule had been invoked in all of the cases.

The Court: All right.

Mrs. L. B. Gibbs, called as a witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Davis:

Q. Will you please state your full name?

A. Mrs. L. B. Gibbs.

Q. By whom are you employed or by whom were you employed on March 31, 1960?

A. J. J. Newberry Company.

Q. Are you still employed there?

A. Yes, I am.

Q. Do you recall the occasion about the middle of the morning on March 31, some disturbance or commotion there at the store?

A. Yes, sir.

Q. Did two colored boys come in and have a seat at the luncheonette or dining area in the store?

A. Yes, they did.

[fol. 21] Q. What is your position with the store, Mrs. Gibbs?

A. I am a Store Detective.

Q. Who were the two boys, if you remember on that occasion?

A. William West and Robert Parker.

Q. Do you see them in the Courtroom?

A. Yes, sir.

Q. Can you point them out?

A. I think that is West with the green jacket or green coat and Parker in the dark coat I believe.

Q. Those are the two boys sitting behind their attorneys?

A. Yes, sir.

Q. What conversation, if any, did you have with the two defendants on that occasion?

A. I went over to the lunch counter when I saw them sitting there and identified myself and told them that they would have to leave, they couldn't be served there, but if they would go to the fourth floor we have a snack bar for colored there and they would be served on the fourth floor.

Q. What did they say, if anything?

A. They said they were not leaving, that they were not violating any law.

Mr. Davis: I believe that is all.

Cross examination.

By Mr. Hall:

Q. Mrs. Gibbs, are you still employed by Newberry's?

A. I am.

Q. The lunch counter, were they seated at the time you saw them?

A. The luncheonette on the first floor.

Q. Is that lunch counter open to Newberry's customers?

A. It is open to white customers.

Q. Only to white customers?

A. That is right.

[fol. 22] Q. You have another lunch counter on the premises?

A. We have another luncheonette in the basement of the store and then we have this for colored people on the fourth floor.

Q. A luncheonette in the basement of the store. Is that open to Newberry's customers also?

A. White customers.

Q. White customers only?

A. Yes, sir.

Q. That is the only requirement that they be white?

A. Yes.

Q. And the fourth floor, you have another luncheonette which is open to Newberry's customers if they are colored?

A. Yes, sir.

Q. Do you serve only colored people at that luncheonette or do you serve all?

A. Only colored.

Q. That is true today?

A. Yes.

Mr. Hall: That is all.

Mr. Davis: Mr. Stallings.

LLOYD L. STALLINGS, called as a witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Davis:

Q. Will you state your full name, please, sir?
A. Lloyd L. Stallings.
Q. By whom are you employed, Mr. Stallings?
A. J. J. Newberry Company.
Q. In what capacity?
A. Assistant Store Manager.
Q. Were you so employed on March 31, 1960?
A. I was, yes, sir.
Q. About the middle of the morning did you have oc- [fol. 23] casion to visit the area of the luncheonette or soda fountain on the first floor of Newberry's?
A. I did.
Q. Was there anything unusual there at the time, sir?
A. There was two, well I was called down there, someone called me from the office and said there was a lot of confusion at the lunch counter, would I come down. And so I came down and two colored men were sitting there.
Q. Did you have any conversation with them relative to it?
A. Well I asked them, I said, "You know you can't do this." I said, "We have a lunch counter up on the fourth floor for colored people only. We would appreciate it if you would go up there."
Q. What was their response to that, Mr. Stallings?
A. Well one of them, I don't know which one said, "Well we have our rights."
Q. Did they indicate they were not going to leave?
A. I saw they were not going to leave. Well they didn't say they were not going to leave, but they kept sitting there and said, "We have our rights." That was the answer that they gave.

Mr. Davis: That is all.

Cross examination.

By Mr. Hall:

Q. Mr. Stallings, did you call the police?

A. I did not.

Q. Did any other official at Newberry's call the police?

A. Someone, now I don't remember who this person was, but someone said to me that we called the police. I don't know who it was. I don't remember that.

Q. You were there when the police came in, were you not?

A. Yes, I was.

Q. Did you make a complaint to the police?

A. I didn't, no.

Q. Did anyone make a complaint in your presence for Newberry's?

A. I don't remember if they did, no, sir.

Q. Are you still employed by Newberry's?

[fol. 24] A. I am.

Q. Subsequent to that time prior to the first trial in City Court did you make a complaint to the City of Birmingham against these two defendants?

A. I didn't no.

Q. Do you know that anyone representing J. J. Newberry's has?

A. I don't know whether they have or not.

Q. Mr. Stallings, is Newberry a National chain organization?

A. Yes, it is.

Mr. Davis: We object to that if the Court pleases.

The Court: That is all right. Leave it in.

Q. Is it engaged in selling merchandise both hard goods and soft and otherwise to the public generally?

A. Yes, si.

Q. Do you customarily take full-page advertising in local newspapers and other advertising media?

A. I don't understand the question.

Q. Do you usually or ordinarily advertise your merchandise for sale in newspapers to the public generally?

A. Yes, sir.

Q. On those occasions do you also advertise your lunchroom?

A. No, generally we don't.

Q. Have you ever advertised your lunch counter?

A. Maybe we have at some time or another. I don't know. But we don't make a practice. I don't remember a specific time of doing that.

Q. Do you have signs at your lunch counter advertising specials and prices?

A. Yes, we do.

Q. Is there any sign at your lunch counter which indicates whether or not it is for white or colored?

A. I don't believe there is a sign that says for white only. We have one at the colored luncheonette that says for colored only.

Q. Where is that?

[fol. 25] A. On the fourth floor.

Q. On the fourth floor?

A. Yes.

Q. And this occurred on the first floor?

A. That is right.

Q. Are there other departments on the first floor besides the luncheonette?

A. Oh, yes.

Q. Merchandise generally?

A. Yes.

Q. And white and colored persons generally shop on the first floor?

A. Yes.

Q. That is done ordinarily, is that true?

A. Yes.

Q. On the part of the buying public?

A. Yes.

Q. Have you worked at Newberry's Store at any other place other than Birmingham?

A. I have not.

Q. Have you visited any other J. J. Newberry Stores?

A. Oh, a time or two I have, yes, sir.

Q. Does Newberry have a policy of serving and not serving persons of another race or particular color?

A. I don't have anything to do with the making of the policies of Newberry Company.

Mr. Davis: We object as incompetent, irrelevant and immaterial as to what policy they may have in other parts of the country

Mr. Hall: If Your Honor pleases, I think it is very material. The meat in this coconut is whether or not Newberry's Department Store has complained or the City of Birmingham. It is our theory of the case it is necessary for the owner of the premises to be complaining and we are trying to find out if they have complained. Mr. Stallings who is Assistant Manager says he has not complained. [fol. 26] Mrs. Gibbs didn't testify to any complaint. The only person the officer knows of no complaint except he thinks some other officer might have had one by radio. Now we want to know who is prosecuting these defendants. If it is Newberry's policy to serve persons at different counters we would like to know if, I think it is material.

The Court: Can we adjudicate cases here on persons or corporations' policies?

Mr. Hall: Well I don't know sir.

The Court: I do. We can't. I pointed that out this morning. We are not dealing with policies of stores. We are dealing with a City Code.

Mr. Hall: If Your Honor pleases, as we understand the ordinance involved, in order for it to be brought to bear on a defendant our theory was it would be necessary for some private persons to bring in the City Police ordinarily under the circumstances. It is not one of those ordinances which is against the peace and dignity of the State.

The Court: What would we do with Mrs. Gibbs' testimony?

Mr. Hall: I don't know, sir. Mrs. Gibbs testified she told them they couldn't be served there, but that does not necessarily mean they were told to leave.

The Court: I think she was very smart because when they said they were not leaving she didn't tell them to leave.

Mr. Hall: I don't recall that, but I was trying to get into what the situation is. As I understand the particular ordinance, it is possible I am misinformed and don't know

what it means, but as I understand it, if a person is on my premises ordinarily a policeman cannot decide whether or not they should be arrested unless I make a complaint. Now if they come on at my invitation and I tell them to leave and they don't and I summon the police I should come to Court and say I did, that I invited them and then I withdrew my invitation. Mr. Stallings has testified to newspaper advertisements inviting the general public to Newberry's Store and there is no basis of color in the advertisements. Now colored and white people shop in Newberry's, in the various departments as he testified to and [fol. 27] there is no racial discrimination, racial designation on the first floor. We are trying to find at what point the invitation was withdrawn, on whose complaints were these men arrested and whose prosecution they are being prosecuted. Now if we are proceeding under the Trespass Ordinance, that is the way we understand it. If it is one of the ordinances where the policeman himself can decide that is a different matter.

The Court: Is there any question before the Court now?

Mr. Hall: If Your Honor pleases we had asked Mr. Stallings about Newberry's policy.

The Court: That is not competent.

Mr. Hall: We want an exception. That is all Your Honor.

The Court: Anything further?

Redirect examination.

By Mr. Davis:

Q. They didn't turn out any lights on this occasion, did they Mr. Stallings?

A. I don't remember that we did, no.

Q. They asked you about advertising. They didn't advertise that the white and colored sat at the same tables and counters in their advertising when they did advertise their luncheonettes did they? Would you answer that for the record, please, sir?

A. No, we did not.

Mr. Davis: That is all.

Recross-examination.

By Mr. Hall:

Q. Mr. Stallings, you didn't advertise that white and colored are served at the same notions counter, did you?

A. No.

Q. But you did serve them at the same counter?

A. We did.

Q. You have been doing it since you have been at Newberry's?

A. Yes, sir.

Q. You do it today?

A. Yes, sir.

[fol. 28] Q. No Negro has been arrested for buying at a notion counter alongside a white person, have they?

A. Not that I know of.

Mr. Hall: That is all.

Mr. Davis: That is our case.

Mr. Adams: Judge, we would like to make a motion to exclude in the case of Robert Parker, a written motion in his particular case, and oral motion being the same as a written motion in the case of Robert Parker in the case of William West, and the basis of our motion being the same as previous, and also in this particular case the fact that there was invitation to the public generally to trade at Newberry's, that the eating facilities that the defendants were sitting in had no signs indicating that there was any segregation of the races, and furthermore, in addition to that, there is no proof coming from anybody in any official capacity at Newberry's that they were warned to leave and that they would be guilty of a crime if they stayed. There is no evidence in the record to the effect that the warning was given. I think the Judge observed after they said they were going to stay that Mrs. Gibbs tactfully did not state for them to go after they said they were going to stay, so I do not believe that the establishment has been made. There was some vague reference to what Mr. Stallings would testify to but when he got on the witness stand he didn't testify. He didn't call for the police officer arrest the people. So the case falls down on just the lack of proof of violation of the ordinance as well as falling

down on the Constitutional grounds also. So therefore in these two defendants' cases the City hasn't made out a case and they should be discharged obviously.

The Court: Same ruling as in the other cases.

Mr. Adams: We except.

William West, called as a witness, having been first duly sworn, testified as follows:

[fol. 29] Direct examination.

By Mr. Shores:

Q. Will you state your full name?

A. My name is William West.

Q. William did you accompany Parker to Newberry's on this date of March 31?

A. No, sir.

Q. Did you happen to go to Newberry's on that particular date?

A. I did.

Q. Who did you meet after you got there?

A. I met Parker, Robert Parker.

Q. Robert Parker. You met Robert Parker there?

A. Yes, sir.

Q. Did you make any purchases while you were at Newberry's?

A. I did.

Q. What did you purchase?

A. I bought some paper and some small comic books.

Q. Small comic books?

A. The novel type is what I mean.

Q. After you made the purchases what did you do?

A. Well by that time Parker and I was walking around in the store and I said, "Let's go over here and get something to eat."

Q. Did Parker buy anything?

A. I don't know. I saw him with a package. I don't know what was in it.

Q. In other words, you met him there in the store?

A. In the store.

Q. You didn't go together?
A. No, sir.
Q. You didn't go shopping together?
A. No, sir.
Q. He was in the store when you first met him?
A. When I met him he was.
Q. You invited him to go with you to get something to eat?
A. To get something to eat, yes, sir.
Q. Where did you go?
[fol. 30] A. We went to the lunch counter.
Q. Did this lunch counter have any designation as to race?
A. Well I didn't see any sign or anything that would indicate it.
Q. Was anybody else sitting at the lunch counter?
A. Yes, sir, there was several white people, ladies and gentlemen that were sitting there.
Q. You and West, I mean Parker are Negroes?
A. That is right.
Q. Were the white people eating?
A. They were. Some of them were drinking coffee.
Q. Did you order anything while you were sitting there?
A. No, sir. The waitress never did come and see what we wanted.
Q. Did anybody ever come and invite you to leave?
A. No, sir.
Q. Did anybody ever tell you to leave?
A. No, sir.
Q. Did any person in connection with the store tell you that you could be served elsewhere in the store?
A. Yes, sir.
Q. Do you recall just what conversation took place at that time?
A. No, not exactly, but a lady came up to us and said, "We have a lunch counter for colored people in some other department of the store."
Q. But did she tell you to leave that lunch counter?
A. No, sir, she didn't or I don't recall it.

Mr. Davis: I didn't hear you.

A. I said she didn't or I don't recall it.

Q. Do you recall whether or not the white people ordered anything and were served while you were sitting there?

A. Well I don't recall but I do remember some of them were eating and drinking.

Q. Eating and drinking?

[fol. 31] A. Yes, sir.

Q. Did you see the waitress waiting on anybody?

A. No, I didn't.

Q. When did you first notice or were first approached by a police officer?

A. Well it was after the lady had talked to us and another gentleman. After he finished talking to us we probably stayed there about well, three or four minutes and I happened to look around and saw some officers coming.

Q. Did the officers make any statements to you when they first approached you?

A. No, sir.

Q. Did they arrest you?

A. Well after they had gotten the people up they did.

Q. He ordered the other people up?

A. He was doing his hand that way. I assumed he was doing it for them to get up.

Q. He was making motions towards the white people?

A. That is right. He did like that.

Q. Did he motion you up?

A. No.

Q. After he had motioned the white people away did all of them leave?

A. No, all of them didn't leave.

Q. Now what did the officer say to you, if anything?

A. After he started motioning the white people away we started to get up and when we started to get up one got me in the back or somewhere in behind.

Q. Before the officer caught you in the back had any official or any officer in the store ordered you to leave that counter?

A. Not to leave.

Q. After the officer motioned the other people to leave you attempted to leave?

A. After I saw him motioning other people up I said, [fol. 32] "Let's go." And we started to get up.

Q. And when you attempted to get up that is the time that the officer caught you?
A. Yes, sir.
Q. Caught you in your pants?
A. Somewhere behind. I don't know exactly.
Q. Did he make any statement when he caught you?
A. No.
Q. Did he say you were under arrest?
A. Well, yes.
Q. When did he tell you you were under arrest?
A. After we had gotten outside of the store.
Q. Did he tell you what you were being arrested for?
A. If he did I didn't hear it.

Mr. Shores: That is all.

Cross examination.

By Mr. Davis:

Q. You expected to be arrested when you went there, didn't you Parker?
A. I am not Parker.
Q. Pardon, West.
A. No, I didn't. I expected to get served because they had served at some counters.
Q. That was not what they told you at the meeting the day before.

Mr. Hall: If Your Honor pleases, we object to any reference to any meeting.
The Court: Leave it out.

Q. I believe you say you just happened to meet Parker down there?
A. That is right.
Q. Parker didn't know you were coming and you didn't know Parker was coming?
A. I didn't.
[fol. 33] Q. I beg your pardon?
A. I didn't know it.
Q. What time were you supposed to meet there?
A. I didn't know whether Parker would be there or not.

Q. You all talked about it the day before, didn't you?

A. Talked about what?

Q. About the thing you were going to do at Newberry's, is that right?

Mr. Hall: We object to that, Your Honor.

The Court: I think in the light of his statement it would be competent to ask him if they had said anything about it the day before.

Q. You were at Reverend Shuttlesworth's house the day before?

Mr. Hall: We object to whether he was at Reverend Shuttlesworth's house or at any other place the day before.

The Court: Let him answer whether he was there at Shuttlesworth's the day before.

Mr. Hall: If Your Honor pleases, we want an exception to the ruling. Our objection is predicated on the fact that the question is incompetent and irrelevant.

The Court: Let the ruling stand.

Q. The day before you were arrested were you at Shuttlesworth's house?

A. Well I have been to Reverend Shuttlesworth's church several times.

Q. Did I ask you that, Did I ask you how many times you had been there?

A. Been where?

Mr Davis: Would it be asking the Court too much to ask the witness to answer the question.

The Court: Reshape it.

Mr. Davis: I beg your pardon?

The Court: Recast the question.

[fol. 34] Q. Were you at Reverend Shuttlesworth's house on March 30, 1960?

A. March 30, 1960?

Q. The day before this incident?

A. No, I was not there the day before.

Q. Do you understand we have got a perjury law here?

Mr. Billingsley: Your Honor, we are going to object to that.

Q. I have some statements and I am going to ask him if he was not at Reverend Shuttlesworth's house the day before. Is that your statement. You were not at this house on March 30, 1960?

A. In the daytime?

Q. In the daytime or nighttime?

A. I was there that night.

Q. There is 24 hours in the day.

A. I was there that night.

Mr. Hall: If Your Honor pleases, we are going to object to the way counsel is carrying on his cross-examination as argumentative and it is intimidating the witness.

The Court: The Court thinks this lad has been intimidated elsewhere, and made a tool elsewhere, made a dupe of elsewhere under this evidence.

Q. Was it not prearranged at Shuttlesworth's house on March 30, 1960 that you were to meet Parker at Newberry's Store at a given time on March 31, 1960?

Mr. Hall: If Your Honor pleases, we would like to object for the record.

The Court: Let him answer it. Overruled.

Mr. Hall: We except.

The Witness: Repeat the question.

The Court: Read the question.

(Question read as follows: Was it not prearranged at Shuttlesworth's house on March 30, 1960 that you were to meet Parker at Newberry's Store at a given time on [fol. 35] March 31, 1960?)

A. Well, I don't recall any such.

Q. Whereabouts in the store did you run into Parker, West?

A. I believe it was, I believe it was on the first floor. I am not sure.

Q. Somebody wrote on a piece of paper the name of every store you boys were to go to. Is that not correct? At this meeting you attended?

Mr. Hall: We object to that on the same grounds.

A. Well, I didn't see any paper.

Q. I didn't ask you if you saw it. I said somebody wrote on a piece of paper where each one of you were to go, isn't that correct?

A. I didn't see that there.

Q. Did you tell Detective Pierce that you did?

A. Tell him that somebody wrote on a piece of paper?

Mr. Hall: We object to that. Proper predicate has not been laid.

The Court: That is a predicate itself.

Mr. Hall: We object to the question, we take an exception.

The Court: Will you answer the question.

A. I don't remember telling him.

Q. Do you remember talking to Detective Pierce the day after the sit-ins?

A. Yes, sir.

Q. After you had been in jail?

A. I do.

Mr. Davis: That is all.

Mr. Shores: That is all, come down. We rest, Your Honor.

Mr. Davis: That is all for the City.

[fol. 36] Transcript of Sentencing (omitted in printing).

* * * * * * * * *

[fol. 41] Reporter's and Clerk's Certificates to foregoing transcript (omitted in printing).

[fol. 43]

IN THE COURT OF APPEALS OF ALABAMA

No. .....

ROBERT L. PARKER, JR., Appellant,

vs.

THE CITY OF BIRMINGHAM, Appellee.

ASSIGNMENT OF ERRORS

The Appellant says that there is manifest error in the foregoing Transcript of the Record of the proceedings, had and done in the Honorable Circuit Court of Jefferson County, Alabama, to the hurt and prejudice of this appellant, and for error, assigns each of the following, separately and severally:

1. The Court erred in over-ruling Appellant's Motion to Strike the Complaint filed in this cause, to which ruling the Appellant took exceptions. (Tr. 2, 3, 8 & 16).

2. The Court erred in over-ruling the Appellant's Demurrers filed in this cause, to which the Appellant took exceptions. (Tr. 3, 4, 8 & 16).

3. The Court erred in over-ruling the Appellant's Motion to Exclude the Evidence filed in this cause, to which ruling the Appellant took exceptions. (Tr. 5, 7 & 28).

4. The Court erred in over-ruling Appellant's Motion for a New Trial. (Tr. 9, 10, 12 & 40).

5. The Court erred in refusing to permit the witness, Lloyd L. Stalling, Assistant store manager of J. J. Newberry Company, to testify as to the racial policies of aforesaid company, in service for persons of different races, to which ruling Appellant took exceptions. (Tr. 25-27).

Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, Jr., J. Richmond Pearson, Attorneys for Appellant.

[fol. 44] Certificate of Service (omitted in printing).

[fol. 45]

IN THE COURT OF APPEALS OF THE STATE OF ALABAMA

JUDICIAL DEPARTMENT

October Term, 1960-61

6 Div. 800

ROBERT L. PARKER, JR.

v.

CITY OF BIRMINGHAM.

Appeal from Jefferson Circuit Court

November 2, 1960
Certificate Filed

January 30, 1961
Transcript Filed

April 18, 1961

Come the parties by attorneys, and argue and submit this cause for decision.

ORDER OF AFFIRMANCE—May 30, 1961

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court, there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed, on authority of Gober v. City of Birmingham, 6th Division 797, Ala. App. Ms. It is also considered that the appellant pay the costs of appeal of this court and of the Circuit Court.

[fol. 46] Application for Rehearing and Order Overruling (omitted in printing).

[fol. 46a] Proceedings on Petition for Certiorari (omitted in printing).

[fol. 47]

IN THE SUPREME COURT OF ALABAMA

No. 756 Sixth Division

EX PARTE: ROBERT L. PARKER, JR.

ROBERT L. PARKER, JR., Appellant,

vs.

CITY OF BIRMINGHAM, Appellee.

PETITION FOR CERTIORARI—Filed July 3, 1961

To the Honorable Chief Justice and Associate Justices of the Supreme Court of Alabama

1. Comes the Appellant, by and through his Attorneys, Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, Jr. and J. Richmond Pearson and respectfully petitions this Honorable Court to review, revise and reverse and hold for naught that certain judgment of the Court of Appeals, on to-wit: May 30, 1961, wherein Petitioner was Appellant and the City of Birmingham was Appellee, which Judgment affirms the Judgment of the Circuit Court of Jefferson County, Alabama.

2. Your petitioner avers that application to the Court of Appeals for a rehearing of said cause and Brief in support thereof were duly filed by your petitioner within the time required by law, and that said application for rehearing was overruled by said Court of Appeals on the 20th day of June, 1961.

3. Your petitioner respectfully shows unto the Court that this cause arose from a complaint filed by the City of Birmingham, charging your petitioner with violating Section 1436 of the General City Code of Birmingham, viz:

"Any person who enters into the dwelling house or goes or remains on the premises of another, after being warned not to do so, shall on conviction, be punished

as provided in Section 4, provided that this Section shall not apply to police officers in discharge of official duties."

4. Your petitioner filed a Motion to Quash the Complaint and Demurrers to the Complaint, on grounds that the Complaint was so vague and indefinite as not to apprise the Appellant of what he was called upon to defend, and further, that the ordinance which formed the basis of the prosecution, as applied to Appellant, constituted an [fol. 48] abridgement of the privileges and immunities guaranteed by the Constitution of the United States and that the ordinance was unconstitutional on its face.

5. The Court overruled the Motion to Quash and the Demurrers whereupon petitioner was tried without a jury, and was found guilty of Trespass after Warning, and fined One Hundred ($100.00) Dollars and costs, and sentenced to a term of Thirty (30) days of hard labor for the City of Birmingham.

6. Your petitioner filed a Motion to Exclude the Evidence at the close of the city's case, which Motion was denied. After Judgment and sentence, petitioner filed a Motion for a New Trial, which Motion was denied, and petitioner perfected his appeal.

7. Your petitioner further shows unto your Honors that the Court of Appeals erred in affirming and failing to reverse said cause, in the following ways, to-wit: The Court based its judgment in this cause, upon the opinion judgment rendered in the case of James Gobe, vs. City of Birmingham, Sixth Division 797, decided May 30, 1961, which case had a different factual situation from petitioner's case; and there was a different proposition of law involved in petitioner's case, not involved in case of Gober vs. City of Birmingham.

8. That the Proposition of Law involved, which petitioner claims should be reviewed and revised by this Court, are as follows:

A. That the Ordinance and Complaint, the basis of the prosecution, are unconstitutional on their face, that they are so vague, indefinite and uncertain as to constitute a deprivation of liberty, without due process of law, in Violation of the Fourteenth Amendment to the United States Constitution.

B. That the Ordinance and Complaint, the basis of the prosecution, as applied to petitioner, constitute an abridgement of the privileges and immunities, and a denial of the equal protection of the Law, all in violation of the Fourteenth Amendment to the United States Constitution.

C. That to warrant a conviction, the evidence must identify the accused, as the person who committed the crime.

The Court of Appeals erred in failing to rule that the conviction of petitioner was a violation of due process of law, an abridgement of the priviliges (sic) and immunities, equal protection of the law, and a violation of the Fourteenth Amendment to the Constitution of the United States.

The Court of Appeals erred in failing to rule that to warrant a conviction, the evidence must identify the accused as the person who committed the crime.

Wherefore, Your petitioner most respectfully prays that a Writ of Certiorari be issued out of and under the Seal of this Court directed to the Court of Appeals of Alabama, commanding and requiring said Court to certify and send to this Court, on a day certain to be designated by this Court, a full and complete Transcript of Record, and all proceedings of said Court of Appeals of Alabama, in the Cause numbered and entitled aforesaid, to the end that [fol. 49] this cause may be reviewed and determined by this Honorable Court, as provided by law and the rules and practice of this Court, and that this Court thereupon proceed to review and correct the errors complained of and to reverse the Judgment of the Court of Appeals or Judgment as should have been rendered by the Court of Appeals.

Petitioner prays that this Honorable Court suggest and require the Court of Appeals to Stay or recall its Certifi-

cate of Affirmance of said cause, during the pendency of this petition.

And petitioner prays for such other, further and additional relief in the premises, as to this Court may seem appropriate, and to which he may be entitled, and your petitioner will ever pray.

Respectfully submitted.

Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, J. Richmond Pearson, By J. Richmond Pearson, Attorneys for Appellant.

Duly sworn to by J. Richmond Pearson, jurat omitted in printing.

Certificate of Service (omitted in printing).

[fol. 50] Order Denying Petition for Writ of Certiorari (omitted in printing).

[fol. 51] Application for Rehearing (omitted in printing).

[fol. 52] Order Overruling Application for Rehearsing (omitted in printing).

[fol. 53] Clerks' Certificates to foregoing transcript (omitted in printing).

[fol. 1]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA IN AND FOR JEFFERSON COUNTY

No. 20791

THE CITY OF BIRMINGHAM,

vs.

WILLIAM WEST.

APPEAL BOND (omitted in printing).

[fol. 2]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20791

CITY OF BIRMINGHAM, a Municipal Corporation, Plaintiff,

vs.

WILLIAM WEST, Defendant.

COMPLAINT—Filed October 10, 1960

Comes the City of Birmingham, Alabama, a municipal corporation, and complains that William West, within twelve months before the beginning of this prosecution and within the City of Birmingham or the police jurisdiction thereof did go or remain on the premises of another, said premises being the area used for eating, drinking and dining purposes and located within the building commonly and customarily known as J. J. Newberry Co., 200 North 19th Street, Birmingham, Alabama, after being warned not to do so, contrary to and in violation of Section 1436 of the General City Code of Birmingham of 1944.

Watts E. Davis, Attorney for City of Birmingham.

[File endorsement omitted]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20791

CITY OF BIRMINGHAM,

vs.

WILLIAM WEST.

MOTION TO STRIKE—Filed October 10, 1960

Comes now William West, defendant in this cause, and moves to strike the complaint in this cause, and as grounds for said Motion, sets out and assigns the following, separately and severally:

1. That the complaint, affidavit, etc., is not sworn to.

2. That the allegations of the said complaint are so vague and indefinite, as not to apprise this defendant of what he is called upon to defend.

3. That the ordinance or statute upon which is founded the complaint in this cause, as applied to this defendant, as a citizen of the State of Alabama, and of the United States, constitutes an abridgment of the freedom of assembly, [fol. 3] speech and liberties secured to the Defendant, by the Constitution and laws of the State of Alabama and the Fourteenth Amendment of the Constitution of the United States of America.

4. That the said ordinance or statute which is the basis for the affidavit, information or complaint in this cause, as applied to the defendant, constitutes an abridgment of privileges and immunities guaranteed defendant, as a citizen of the United States, in violation of the Constitution and laws of the State of Alabama, and of the Fourteenth Amendment of the United States Constitution.

5. That Section 824 of the General City Code of the City of Birmingham, as applied to this defendant, a Negro citizen of the United States, constitutes a denial of due process and equal protection of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

6. That the said affidavit, information or complaint, does not charge any offense, which is cognizable by this Court.

Arthur D. Shores, J. Richmond Pearson, Orzell Billingsley, Jr., Peter A. Hall, Attorneys for Defendant.

[File endorsement omitted]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20791

CITY OF BIRMINGHAM,

vs.

WILLIAM WEST.

DEMURRERS—Filed October 10, 1960

Comes now William West, defendant in this cause, and demurs to the complaint in this cause, and to each and every count thereof, separately and severally, and as grounds for such demurrer sets out and assigns the following, separately and severally:

1. The affidavit or information which support the complaint in this cause, does not charge defendant with any offense under the Constitution and laws of the State of Alabama.

[fol. 4] 2. That the complaint, affidavit or information upon which this cause is based is insufficient to support

prosecution of this cause, in that no offense is charged which is cognizable by this Honorable Court.

3. That the allegations of the complaint and each count thereof are so vague and indefinite as not to apprise this defendant of what he is called upon to defend.

4. That the ordinance, Section 1436 of the 1944 General City Code of Birmingham, Alabama, as applied to this defendant, is invalid in that it violates Section 4, Article 1, of the Constitution of Alabama, and the First and Fourteenth Amendments to the Constitution of the United States of America.

5. That Section 1436 of the 1944 General City Code of Birmingham, Alabama, which supports the complaint, affidavit or information in this cause, as applied to this defendant, a citizen of the State of Alabama and of the United States, constitutes an abridgment of freedom of speech and assembly violative of rights and liberties secured the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

6. That the aforesaid ordinance as applied to defendant, is unconstitutional on its face in that it is so vague as to constitute a deprivation of liberty without due process of law in violation of the provisions of the Fourteenth Amendment to the United States Constitution.

7. That the said Ordinance or Statute in this case, as applied to defendant, constitutes an abridgment of privileges and immunities guaranteed defendant as a citizen of the United States, in violation of the Fourteenth Amendment to the United States Constitution.

8. That the said Ordinance, as applied to defendant, constitutes a denial of equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States of America.

Arthur D. Shores, Orzell Billingsley, Jr., J. Richmond Pearson, Peter A. Hall, Oscar W. Adams, Jr., Attorneys for Defendant.

[File endorsement omitted]

[fol. 5]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

Appealed from Recorder's Court

(Trespass After Warning)

Honorable Geo. Lewis Bailes, Judge Presiding

CITY OF BIRMINGHAM,

vs.

WILLIAM WEST.

JUDGMENT ENTRY—October 10, 1960

This the 10th day of October, 1960, came Wm. C. Walker, who prosecutes for the City of Birmingham, and also came the defendant in his own proper person and by attorney, and the City of Birmingham files written Complaint in this cause, and the defendant being duly arraigned upon said Complaint for his plea thereto says that he is not guilty; and defendant files motion to strike, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion the defendant hereby duly and legally excepts; and the defendant files demurrers, and said demurrers being considered by the Court, it is ordered and adjudged by the Court that said demurrers be and the same are hereby overruled, to which action of the Court in overruling said demurrers the defendant hereby duly and legally excepts; and the defendant makes oral motion to exclude the evidence, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion, the defendant hereby duly and legally excepts; and on this the 11th day of October, 1960, the Court finds the defendant guilty as charged in the Complaint and thereupon assessed a fine

Q. Tell the Court just what happened after you seated yourselves at the lunch counter?

A. Well we sat down and waited for a waitress to serve us and one came up and said, "I'm sorry I can't serve you." There were several waitresses behind the counter so we waited until another one came up and offered to serve us and that is all.

Q. Were you ever served?

A. We were never served.

Q. Did anybody come up and ask you to leave?

A. No one ever asked us to leave.

Q. Did this Mrs. Evans speak to you at all?

[fol. 22] A. Well I have never seen her until the night of the last trial was the first time I saw her.

Q. Well did anybody ask you to leave? Did anybody in connection with the store ask you to leave?

A. Not unless some of the policemen were connected with the store.

Q. Were any white persons seated at the lunch counter?

A. There were several.

Q. Were they eating?

A. They were.

Q. Were they being served?

A. They were being served until we came and then they began to close the counter and ordered these white people away and one refused to leave and then he was forced by the policeman to leave his seat. He was sitting directly next to us. Most of them remained until they were ordered away or finished their food.

Q. Do you know whether or not this white man that remained was arrested?

A. He was not.

Mr. Davis: We object to that as incompetent, irrelevant and immaterial.

The Court: Well if he could know, all right.

Q. Did you see any white people arrested?

A. There were none arrested to my knowledge.

Q. Now did you see Officer Casey the officer that testified?

A. I did.

Q. When did you first see him?

A. When we were taken to the patrol car on the outside of the store. He was at the patrol car and he began to question us, asking our name and so on and at the time we asked him what we were charged with and he made statements to the effect we just had to do it and something of a similar nature.

Q. Was he the officer that accosted you in the store?

A. No, he was not the officer that approached us in the [fol. 23] store. The officer that approached us in the store in my way of thinking probably was a superior officer because he had two bars on his shoulder, something similar to a Captain in the Army or Armed Services, and he was the one that approached us and he asked us to leave and said in this respect, "Let's go," and I asked him whether or not we were under arrest and he said, "Yes, you are under arrest," and before we could say anything else someone had grabbed us in back of the pants and was pushing us out of the store.

Q. Did he tell you at that time what you were being arrested for?

A. Well I didn't get a chance to ask him.

Q. But you were told when you were placed in the patrol car?

A. I was told by Officer Casey. He was in the patrol car. I think that is his name, the officer that was on the stand preceding me.

Q. Were there any signs designating whether or not this lunch counter was for white or colored?

A. No, the only signs I could visualize or saw were signs more or less of an inviting nature, such as banana splits twenty-five cents, hamburgers, the price of the food that you were able to purchase at the counter. There were no signs designated any color or any special type of customers.

Q. Were you refused, did anybody refuse to sell you anything at these other counters when you attempted to make other purchases?

Mr. Davis: We object to that as incompetent, irrelevant and immaterial.

The Court: That is all right, he can answer.

A. No, we were not refused at any of the other counters.

Mr. Shores: That is all.

Cross examination.

By Mr. Davis:

Q. You had been told to expect the arrest, hadn't you?

A. No, sir.

[fol. 24] Q. The day prior to this occasion?

Mr. Pearson: Your Honor, we object as immaterial, irrelevant and outside of all of the issues.

The Court: He said he was not.

Q. Well you had been told to stay there until you were arrested?

A. I had not been told to stay there and I had not been told to be arrested.

Mr. Pearson: We object to that.

Q. What was the answer?

A. I had not been told to stay there nor had I been told to stay there until I was arrested.

Q. Why didn't you leave when they told you to get out of the place or that you would not be served?

A. Well I couldn't leave. The officers had hold of me. If I had run probably they would have shot me.

Q. You say the waitress came up and told you you couldn't be served and you sat there waiting for some other waitress to come up and serve you.

Mr. Pearson: If Your Honor pleases, we object. The witness has not testified to anything that counsel said. He said one waitress told him that she couldn't serve him.

The Court: Well the record speaks for itself.

Mr. Pearson: But this is an argumentative method of cross-examination and we object to that.

Q. I will ask you if I understood you correctly to say that a waitress came to your table and said, "I am sorry but I can't serve you," did you testify to that?

A. I said that a waitress came to where we were sitting

at the counter, and not the table, and said, "I am sorry I can't serve you," not "we" but "I".

Q. What did you take that to mean, that someone else was going to serve you?

A. I really expected service. I had been served prior to [fol. 25] coming to the counter.

Q. You didn't expect that the day before when you all were at Shuttlesworth's house?

A. Are you referring to more than one?

Q. Were you present at Shuttlesworth's house with the other defendant on the day before?

A. When you say the other—who are you referring to?

Mr. Hall: If Your Honor pleases, we object to bringing anybody else into this. Jesse Walker is charged under the count here of trespass after warning and no others are involved and any question as to others not before the Court at this time is irrelevant and immaterial.

The Court: Leave it out.

Q. Did you meet with a group of other defendants on March 30 at Reverend Shuttlesworth's?

Mr. Hall: If Your Honor pleases, we object. Jesse Walker is charged with an offense cognizable under the laws of the City of Birmingham and no others involved. He has admitted he was at the place.

The Court: Let him answer.

Mr. Hall: We take an exception.

A. I did not meet with any group of boys at any other place.

Q. You were present this morning when Gober and Davis testified that there was a meeting. You were not at that meeting?

Mr. Hall: Your Honor, we are going to object to that. He is going into another case which we have tried for purpose of impeachment.

Q. I withdraw the question and ask you this. Did you at any time meet with Reverend Shuttlesworth, Reverend Billups and in the same room during the discussion were James A. Davis, Roy Hutchinson, R. L. Parker and others?

Mr. Hall: If Your Honor pleases, we object to any questions about a meeting. We don't see where it is material, Your Honor, under the charge and under the prosecution, [fol. 26] under the facts, any meeting is immaterial to the issues involved here. The only question is did this man go on somebody else's premises and remain there after he was told to leave, and if he did whether or not he was justified in doing it under the law and under our Constitution. No meeting has any material bearing on the issues here.

Mr. Davis: If the Court pleases I might be able to resolve the question. This witness has testified that he did not expect to be arrested. Supposedly at a meeting or a day prior they were told they would be arrested and I just want to know his story. I think it is within the proper scope of cross-examination.

Mr. Hall: If Your Honor pleases if this man is guilty of an infraction of the law whether or not he expected to be arrested would be immaterial, as ignorance of the law would be no excuse. Whether he was told to go or not told to go is not material to the issues here, relating to something outside of the issues involved in this case of the City of Birmingham against Jesse Walker. The only thing involved is whether he went to Woolworth's and stayed there after they closed the counter and refused to leave when the lady told him to leave, and if she had the authority to tell him to leave, and if in doing that he is guilty of a crime. No meeting is material.

The Court: Sustain the objection.

Q. How many officers came into the store?

A. In number?

Q. Yes.

A. There were at least I would say ten. I do not know the exact or definite number.

Q. Now you say Officer Casey was not one of the ten that came in?

A. I said I did not see Officer Casey or he did not come in contact with me personally until I had left the store and was on the outside in a patrol car.

Q. Well as I understand it you don't know whether

[fol. 27] Officer Casey was inside talking to Mrs. Evans or not?

A. There is a possibility he could have been somewhere in the store talking to Mrs. Evans.

Mr. Davis: That is all.

Mr. Shores: That is all. Thank you. That is our case, Your Honor, we rest.

The Court: Are you going to defer summations until later?

Mr. Shores: Yes, sir.

[fol. 28] Transcript of Sentencing (omitted in printing).

[fol. 33] Reporter's and Clerk's Certificates to foregoing transcript (omitted in printing).

[fol. 35]

IN THE COURT OF APPEALS OF ALABAMA

JESSE WALKER, Appellant,

vs.

THE CITY OF BIRMINGHAM, Appellee.

ASSIGNMENT OF ERRORS

The Appellant says that there is manifest error in the foregoing Transcript of the Record of the proceedings, had and done in the Honorable Circuit Court of Jefferson County, Alabama, to the hurt and prejudice of this appellant, and for error, assigns each of the following separately and severally:

1. The Court erred in overruling Appellant's motion to Strike the Complaint filed in this cause, to which ruling the Appellant took exceptions. (Tr. 2, 3, 8 & 16)

2. The Court erred in overruling Appellant's Demurrers filed in this cause, to which the Appellant took exceptions. (Tr. 3, 4, 8 & 16)

3. The Court erred in overruling the Appellant's Motion to Exclude the Evidence filed in this case, to which ruling Appellant took exceptions. (Tr. 5, 7, 8 & 20)

4. The Court erred in overruling Appellant's motion for a New Trial. (Tr. 9, 10, 11 & 32)

Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, Jr., J. Richmond Pearson, Attorneys for Appellant.

Certificate of Service (omitted in printing).

[fol. 36]

IN THE COURT OF APPEALS OF THE STATE OF ALABAMA

..... JUDICIAL DEPARTMENT

October Term, 1960-61

6 Div. 803

JESSIE WALKER,

v.

CITY OF BIRMINGHAM.

Appeal from Jefferson Circuit Court

November 2, 1960
Certificate Filed

January 30, 1961
Transcript Filed

April 18, 1961

Come the parties by attorneys, and argue and submit this cause for decision.

ORDER OF AFFIRMANCE—May 30, 1961

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the

Circuit Court, there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed, on authority of Gober v. City of Birmingham, 6th Division 797, Ala. App. Ms. It is also considered that the appellant pay the costs of appeal of this court and of the Circuit Court.

[fol. 37] Application for Rehearing and Order Overruling (omitted in printing).

[fol. 37a] Proceedings on Petition for Certiorari (omitted in printing).

[fol. 38] [File endorsement omitted]

IN THE SUPREME COURT OF ALABAMA

No. 759 Sixth Division

EX PARTE: JESSE H. WALKER

JESSE H. WALKER, Appellant,

vs.

CITY OF BIRMINGHAM, Appellee.

PETITION FOR CERTIORARI—Filed July 3, 1961

[fol. 39]

To the Honorable Chief Justice and Associate Justices of the Supreme Court of Alabama

1. Comes the Appellant, by and through his Attorneys, Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, Jr., and J. Richmond Pearson, and respectfully petitions this Honorable Court to review, revise, reverse and hold for naught that certain Judgment of the Court of Appeals, on to-wit: May 30, 1961, wherein Jesse H. Walker was Appellant and the City of Birming-

ham was Appellee, which Judgment affirms the Judgment of the Circuit Court of Jefferson County, Alabama.

2. Your petitioner avers that application to the Court of Appeals for a Rehearing of said Cause and Brief in support thereof were duly filed by your petitioner within the time required by law, and that said application for rehearing was overruled by said Court of Appeals on the 20th day of June, 1961.

3. Your petitioner respectfully shows unto the Court that the cause arose from a complaint filed by the City of Birmingham, charging your petitioner with violating Section 1436 of the General City Code of Birmingham 1944, viz:

> "Any person who enters into the dwelling house or goes or remains on the premises of another, after being warned not to do so, shall on conviction, be punished as provided in Section 4, provided that this Section shall not apply to police officers in Discharge of official duties."

[fol. 40] 4. Your petitioner filed a Motion to Quash the Complaint and Demurrers to the Complaint, on grounds that the Complaint was so vague and indefinite as not to apprise the Appellant of what he was called upon to defend, and further, that the ordinance which formed the basis of the prosecution, as applied to appellant, constituted an abridgement of the privileges and immunities guaranteed by the Constitution of the United States and that the ordinance was unconstitutional on its face.

5. The Court overruled the Motion to Quash and the Demurrers, whereupon petitioner was tried without a jury, and was found guilty of Trespass after Warning, and fined One Hundred ($100.00) Dollars and costs, and sentenced to a term of Thirty (30) days of hard labor for the City of Birmingham.

6. Your petitioner filed a Motion to Exclude the Evidence, at the close of the City's case, which Motion was denied. After Judgment and sentence, Petitioner filed a

Motion for a New Trial, which Motion was denied, and petitioner perfected his appeal.

7. Your petitioner further shows unto your Honors that the Court of Appeals erred in affirming and failing to reverse said cause, in the following ways, to-wit: The Court based its judgment in this cause, upon the opinion judgment rendered in the case of James Gober vs. City of Birmingham, Sixth Division—797, decided May 30, 1961, which case had a different factual situation from petitioner's case; and there was a different Proposition of Law involved in petitioner's case, not involved in case of Gober vs. City of Birmingham.

8. That the Propositions of Law involved, which petitioner claims should be reviewed and revised by this Court, are as follows:

A. That the Ordinance and Complaint, the basis of the prosecution, are unconstitutional on their face, that they are so vague, indefinite and uncertain as to constitute a deprivation of liberty, without due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

[fol. 41] B. That the Ordinance and Complaint, the basis of the Prosecution, as applied to petitioner, a Negro Citizen of the State of Alabama and of the United States, constitute an abridgement of his privileges and immunities, and a denial of the equal protection of the Laws, all in violation of the Fourteenth Amendment to the United States Constitution.

C. That to warrant conviction commission of a violation of the ordinance must be clearly proved.

The Court of Appeals erred in failing to rule that the Conviction of petitioner was a violation of due process of law, and abridgement of his privileges and immunities and a denial of equal protection of the law, all in violation of the Laws and Constitution of Alabama and the Fourteenth Amendment to the Constitution of the United States.

The Court of Appeals erred in failing to rule that to warrant a conviction, the evidence must clearly show a violation of the ordinance involved.

Wherefore, your petitioner most respectfully prays that a Writ of Certiorari be issued out of and under the Seal of this Court directed to the Court of Appeals of Alabama, commanding and requiring said Court to certify and send to this Court, on a day certain to be designated by this Court, a full and complete Transcript of Record, and all proceedings of said Court of Appeals of Alabama, in the Cause numbered and entitled aforesaid, to the end that this cause my be reviewed and determined by this Honorable Court, as provided by law and the rules and practice of this Court, and that this Court thereupon proceed to review and correct the errors complained of and to reverse the Judgment of the Court of Appeals or render such Judgment as said Court should have rendered.

Petitioner prays that this Honorable Court suggest and require the Court of Appeals to Stay or recall its Certificate of Affirmance of said cause, during the pendency of this petition.

[fol. 42] And petitioner prays for such other, further and additional relief in the premises, as to this Court may seem appropriate, and to which he may be entitled, and your petitioner will ever pray.

Respectfully submitted,

Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, Jr., J. Richmond Pearson, By Peter A. Hall, Attorneys for Appellant.

Duly sworn to by Peter A. Hall, jurat omitted in printing.

Certificate of Service (omitted in printing).

[fol. 43] Order Denying Petition for Writ of Certiorari (omitted in printing).

[fol. 44] Application for Rehearing (omitted in printing).

[fol. 45] Order Overruling Application for Rehearing (omitted in printing).

[fol. 46] Clerks' Certificates to foregoing transcript (omitted in printing).

[fol. 1]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA IN AND FOR JEFFERSON COUNTY

No. 20793

THE CITY OF BIRMINGHAM,

vs.

WILLIE J. WILLIS.

APPEAL BOND (omitted in printing)

[fol. 2]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20793

CITY OF BIRMINGHAM, a Municipal Corporation, Plaintiff,

vs.

WILLIE J. WILLIS, Defendant.

COMPLAINT—Filed October 10, 1960

Comes the City of Birmingham, Alabama, a municipal corporation, and complains that Willie J. Willis, within twelve months before the beginning of this prosecution and within the City of Birmingham or the police jurisdiction thereof, did go or remain on the premises of another, said premises being the area used for eating, drinking, and dining purposes and located within the building commonly and customarily known as F. W. Woolworth Co., 219 North 19th Street, Birmingham, Alabama, after being warned not to do so, contrary to and in violation of Section 1436 of the General City Code of Birmingham of 1944.

Watts E. Davis, Attorney for City of Birmingham.

[File endorsement omitted]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20793

CITY OF BIRMINGHAM,

vs.

WILLIE J. WILLIS.

MOTION TO STRIKE—Filed October 10, 1960

Comes now Willie J. Willis, defendant in this cause, and moves to strike the complaint in this cause, and as grounds for said Motion, sets out and assigns the following, separately and severally:

1. That the complaint, affidavit, etc., is not sworn to.

2. That the allegations of the said complaint are so vague and indefinite, as not to apprise this defendant of what he is called upon to defend.

3. That the ordinance or statute upon which is founded the complaint in this cause, as applied to this defendant, as [fol. 3] a citizen of the State of Alabama, and of the United States, constitutes an abridgment of the freedom of assembly, speech and liberties secured to the Defendant, by the Constitution and laws of the State of Alabama and the Fourteenth Amendment of the Constitution of the United States of America.

4. That the said ordinance or statute which is the basis for the affidavit, information or complaint in this cause, as applied to the defendant, constitutes and abridgment of privileges and immunities guaranteed defendant, as a citizen of the United States, in violation of the Constitution and laws of the State of Alabama, and of the Fourteenth Amendment of the United States Constitution.

5. That Section 824 of the General City Code of the City of Birmingham, as applied to this defendant, a Negro citi-

zen of the United States, constitutes a denial of due process and equal protection of law; in violation of the Fourteenth Amendment to the Constitution of the United States of America.

6. That the said affidavit, information or complaint, does not charge any offense, which is cognizable by this Court.

Arthur D. Shores, J. Richmond Pearson, Orzell Billingsley, Jr., Peter A. Hall, Oscar W. Adams, Jr., Attorneys for Defendant.

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20793

CITY OF BIRMINGHAM,

vs.

WILLIE J. WILLIS.

DEMURRERS—Filed October 10, 1960

Comes now Willie J. Willis, defendant in this cause, and demurs to the complaint in this cause, and to each and every count thereof, separately and severally, and as grounds for such demurrer sets out and assigns the following, separately and severally:

1. The affidavit or information which supports the complaint in this cause, does not charge defendant with any [fol. 4] offense under the Constitution and laws of the State of Alabama.

2. That the complaint, affidavit or information upon which this cause is based is insufficient to support prosecution of this cause, in that no offense is charged which is cognizable by this Honorable Court.

3. That the allegations of the complaint and each count thereof are so vague and indefinite as not to apprise this defendant of what he is called upon to defend.

4. That the ordinance, Section 1436 of the 1944 General City Code of Birmingham, Alabama, as applied to this defendant, is invalid in that it violates Section 4, Article 1, of the Constitution of Alabama, and the First and Fourteenth Amendments to the Constitution of the United States of America.

5. That Section 1436 of the 1944 General City Code of Birmingham, Alabama, which supports the complaint, affidavit or information in this cause, as applied to this defendant, a citizen of the State of Alabama and of the United States, constitutes an abridgment of freedom of speech and assembly violative of rights and liberties secured the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

6. That the aforesaid ordinance as applied to defendant, in (sic) unconstitutional on its face in that it is so vague as to constitute a deprivation of liberty without due pr cess of law in violation of the provisions of the Fourteenth Amendment to the United States Constitution.

7. That the said Ordinance or Statute in this case, as applied to defendant, constitutes an abridgment of privileges and immunities guaranteed defendant as a citizen of the United States, in violation of the Fourteenth Amendment to the United States Constitution.

8. That the said Ordinance, as applied to defendant, constitutes a denial of equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States of America.

Arthur D. Shores, Orzell Billingsley, Jr., J. Richmond Pearson, Peter A. Hall, Oscar W. Adams, Jr., Attorneys for Defendant.

[File endorsement omitted]

[fol. 5]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

CITY OF BIRMINGHAM,

VS.

WILLIE J. WILLIS.

Appealed from Recorder's Court

(Trespass After Warning)

Honorable Geo. Lewis Bailes, Judge Presiding

JUDGMENT ENTRY—October 10, 1960

This the 10th day of October, 1960, came Wm. C. Walker, who proseutes for the City of Birmingham, and also came the defendant in his own proper person and by attorney, and the City of Birmingham files written Complaint in this cause, and the defendant being duly arraigned upon said Complaint for his plea thereto says that he is not guilty; and defendant files motion to strike, and said motion being considered by the Court, and it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion the defendant hereby duly and legally excepts; and the defendant files demurrers, and said demurrers being considered by the Court, it is ordered and adjudged by the Court that said demurrers be and the same are hereby overruled, to which action of the Court in overruling said demurrers the defendant hereby duly and legally excepts; and the defendant makes oral motion to exclude the evidence, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion, the defendant hereby duly and legally excepts; and on this the 11th day of October, 1960, the Court finds the defendant guilty as charged in the Complaint and thereupon assessed a fine of One Hundred

($100.00) dollars and costs against said defendant. It is therefore considered by the Court, and it is the judgment of the Court that said defendant is guilty as charged in said Complaint, and that he pay a fine of One Hundred ($100.00) dollars and costs of this cause.

And said defendant being now in open Court, and having presently failed to pay the fine of $100.00 and the costs of $5.00 accrued in the Recorder's Court of the City of Birmingham, or to confess judgment with good and sufficient security for the same, it is therefore considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said Willie J. Willis, perform hard labor for the City of Birmingham for fifty-two days, because of his failure to pay said fine and costs of $5.00 accrued in said Recorder's Court, or to confess judgment with good and sufficient security therefor.

[fol. 6] It is further considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said Willie J. Willis, perform additional hard labor for the City of Birmingham for thirty days, as additional punishment in this cause.

And the costs legally taxable against the defendant in this cause amounting to fifty-one ($51.00) dollars, not being presently paid or secured, and $4.00 of said amount being State Trial Tax, $3.00, and Law Library Tax, $1.00, leaving forty-seven ($47.00) dollars taxable for sentence, it is ordered by the Court that said defendant perform additional hard labor for the County for sixty-three days, at the rate of 75¢ per day to pay said costs. It is further ordered by the Court that after the sentence for the City of Birmingham has expired, that the City authorities return the defendant to the County authorities to execute said sentence for costs.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in this behalf expended for feeding the defendant while in jail, for which let execution issue.

And on this the 11th day of October, 1960, the defendant files motion for a new trial in this cause, and said motion coming on to be heard and determined by the Court, it is

ordered by the Court, and it is the judgment of the Court that said motion be and the same is hereby overruled.

And notice of appeal being given, and it appearing to the Court that upon the trial of this cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Appeals of Alabama, it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at $300.00, conditioned as required by Law.

[fol. 7]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20783

CITY OF BIRMINGHAM, a Municipal Corporation, Plaintiff,

vs.

WILLIE J. WILLIS, Defendant.

MOTION FOR A NEW TRIAL—Filed October 11, 1960

Now comes the defendant, in the above styled cause and with leave of the Court, first had and obtained, and moves this Honorable Court to set aside the verdict and judgment rendered on to-wit, the 11th day of October, 1960, and that this Honorable Court will grant the defendant a new trial, and as grounds for said motion sets out and assigns the following, separately and severally:

1. That the judgment of the Court in said case is contrary to the law.

2. For that the judgment of the Court is contrary to the facts.

3. For that the judgment of the Court is contrary to the law in the case.

4. In that the judgment of the Court is not sustained by the great preponderance of the evidence in the case.

5. For that the judgment of the Court is not sustained by the great preponderance of the evidence in the case.

6. For that the judgment of the Court is so unfair, as to constitute a gross miscarriage of justice.

7. For that the sentence is excessive.

8. For that the Court erred in overruling objections, by the defendant to the introduction of evidence offered on behalf of the City of Birmingham, Alabama, in this case.

9. For the Court erred in overruling objections by the defendant to the introduction of evidence which was so biased and prejudiced that the defendant was denied the right of a fair and impartial trial.

10. The Court erred in overruling defendant's demurrers filed in this cause.

11. The Court erred in overruling the defendant's Motion to Strike the Complaint in this cause.

12. The Court erred in finding the defendant guilty of violating the laws or ordinances of the City of Birmingham, [fol. 8] Alabama, in that the laws or ordinances, under which this defendant was charged and convicted, and as applied to this defendant, constituted an abridgement of freedom of speech violative of rights and liberties secured to the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

13. That the Court erred in refusing to find that the ordinance under which this defendant was being tried, as applied to this defendant, constituted a denial of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

14. That the Court erred in finding the defendant guilty of violating the laws or ordinances of the City of Birming-

ham, Alabama, in that the laws or ordinances under which this defendant was charged and convicted, and as applied to this defendant, constituted a deprivation of liberty without due process of law, in violation of the Constitution of the State of Alabama, and the provisions of the Fourteenth Amendment to the United States Constitution.

15. The Court erred in overruling defendant's Motion to exclude the evidence in this cause.

16. That it appeared from the evidence that no owner of the premises involved had caused the arrest and prosecution of the defendant, but that such arrest was procured by the officials of the City of Birmingham, Alabama, without first having a complaint from such owner, or other person in charge of such premises.

17. For that it appears from the evidence that the defendant was not prosecuted by the owner of private property, as provided for by the pertinent laws or ordinances of the City of Birmingham, but by police officials.

18. For that it appears from the evidence affirmatively that no owner or other person in charge of the premises involved, or otherwise, having authority to do so, procured the arrest of the defendant or signed a complaint or swore out a warrant against the defendant for trespass on private property.

19. For that it affirmatively appears that the defendant was not requested to leave the premises of the store involved, but was only told to go elsewhere in said store.

Oscar W. Adams, Jr., Arthur D. Shores, Orzell Bill-
[fol. 9] ingsley, Jr., Peter A. Hall, J. Richmond
Pearson, Attorneys for Defendant.

ORDER OVERRULING

The foregoing Motion being presented in open Court, this the 11th day of October, 1960; the same being considered and understood, the Court is of the opinion that the same should be overruled.

It is therefore, Ordered, Adjudged and Decreed that the said Motion is hereby overruled.

Geo. Lewis Bailes, Circuit Judge.

[File endorsement omitted.]

Appeal Bond to Court of Appeals (omitted in printing).

[fol. 11]

TRANSCRIPT OF EVIDENCE—October 10, 1960

(omitted in printing.)

COUNSEL'S NOTE RE RECORD

The parties stipulate that the trial transcript in the *Willis* case is identical to that in the *Walker* case.

[fol. 25] Transcript of Sentencing (omitted in printing).

[fol. 30] Reporter's and Clerk's Certificates to foregoing transcript (omitted in printing).

[fol. 32]

IN THE COURT OF APPEALS OF ALABAMA

WILLIE WILLIS, Appellant,

vs.

THE CITY OF BIRMINGHAM, Appellee.

ASSIGNMENT OF ERRORS

The Appellant says that there is manifest error in the foregoing Transcript of the Record of the proceeding, had and done in the Honorable Circuit Court of Jefferson County, Alabama, to the hurt and prejudice of this appellant, and for error, assigns each of the following separately and severally:

1. The Court erred in overruling Appellant's Motion to Strike the Complaint filed in this cause, to which ruling the Appellant took exceptions. (Tr. 2, 3, 5, & 13)

2. The Court erred in overruling the Appellant's Demurrers filed in this cause, to which the Appellant took exceptions. (Tr. 3, 4, 5 & 13)

3. The Court erred in overruling the Appellant's Motion to Exclude the Evidence filed in this cause, to which ruling Appellant took exceptions. (Tr. 5 & 17)

4. The Court erred in overruling Appellant's Motion for a New Trial. (Tr. 6, 9 & 29)

Oscar W. Adams, Jr., Arthur D. Shores, J. Richmond Pearson, Peter A. Hall, Orzell Billingsley, Jr., Attorneys for Appellant.

Certificate of Service (omitted in printing).

[fol. 33]

IN THE COURT OF APPEALS OF THE STATE OF ALABAMA

..... JUDICIAL DEPARTMENT

October Term, 1960-61

6 Div. 806

WILLIE J. WILLIS

v.

CITY OF BIRMINGHAM

Appeal from Jefferson Circuit Court

November 2, 1960
Certificate Filed

January 30, 1961
Transcript Filed

April 18, 1961

Come the parties by attorneys, and argue and submit this cause for decision.

ORDER OF AFFIRMANCE—May 30, 1961

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed, on authority of Gober v. City of Birmingham, 6th Division 797, Ala. App. Ms. It is also considered that the appellant pay the costs of appeal of this court and of the Circuit Court.

[fol. 34] Application for Rehearing and Order Overruling (omitted in printing).

[fol. 34a] Proceedings on Petition for Certiorari (omitted in printing).

[fol. 35] PETITION FOR CERTIORARI (omitted in printing).

COUNSEL'S NOTE RE RECORD

The parties stipulate that the petition filed in the Alabama Supreme Court in the *Willis* case is identical to that filed in the *Walker* case.

[fol. 39] Order Denying Petition for Certiorari (omitted in printing).

[fol. 40] Application for Rehearing (omitted in printing).

[fol. 41] Order Overruling Application for Rehearing (omitted in printing).

[fol. 42] Clerks' Certificates to foregoing transcript (omitted in printing).

[fol. 44]

SUPREME COURT OF THE UNITED STATES

No. 694, October Term, 1961

JAMES GOBER, et al., Petitioners,

vs.

CITY OF BIRMINGHAM.

ORDER ALLOWING CERTIORARI—June 25, 1962

The petition herein for a writ of certiorari to the Court of Appeals of the State of Alabama is granted, and the case is transferred to the summary calendar. The case is set for argument to follow No. 638.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter took no part in the consideration or decision of this petition.

[fol. 45]

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 66

JAMES GOBER, et al., Petitioners,

v.

CITY OF BIRMINGHAM, Respondent.

STIPULATION AS TO PRINTING OF THE RECORD—Filed July 17, 1962

The parties to the above-entitled cause hereby stipulate that the following parts of the record should be printed by

---

the Clerk of the Supreme Court and the following notations as to identical items may be noted by the Clerk to avoid unnecessary duplication in printing:

1. Print the entire record of the proceedings in the Alabama courts in the case of *James Gober v. City of Birmingham*.

2. It is hereby stipulated between the parties that the Clerk may cause the following notations to be printed in appropriate places in printing the record in the *Gober* case:

a. The appeal bond in the Circuit Court printed in the *Gober* case is identical to the appeal bonds in the cases of the other 9 petitioners except for the names and addresses of the petitioners involved.

b. The appeal bond to the Alabama Court of Appeals, printed in the *Gober* case, is identical to the appeal bonds in the cases of the other 9 petitioners except for the names and addresses of the petitioners.

[fol. 46] c. The transcript of the sentencing of the petitioners as printed in the *Gober* record, pp. 50-52 (note that in this portion of the *Gober* record some pages are not numbered), appears in identical form in each of the 10 cases.

d. The application for rehearing in the Alabama Court of Appeals and that Court's order overruling the application in the *Gober* record, p. 66, is identical to the similar applications and orders filed in the other 9 cases except for the captions.

e. The unnumbered page following page 75 in the *Gober* record which lists the proceedings in the Supreme Court of Alabama on the petition for certiorari and gives the dates of rulings, etc., is identical to the corresponding page in the records pertaining to the other 9 petitioners except for the captions.

f. The order of the Supreme Court of Alabama denying the writ of certiorari in the *Gober* record, p. 72, is identical to those in the records pertaining to the other 9 petitioners except for the captions.

g. The application for rehearing of the denial of the writ of certiorari, printed in the *Gober* record at p. 73, is identical to that appearing in the records pertaining to the other 9 petitioners except for the captions.

h. The order of the Supreme Court of Alabama overruling the application for rehearing in the *Gober* record at p. 74 is identical to the corresponding orders in the records pertaining to the other 9 petitioners except for the captions.

3. Print the entire record of the proceedings in the Alabama courts in the case of *James Albert Davis* v. *City of Birmingham*, except that the following items may be omitted:

a. The items listed in paragraph 2a through 2h above.

[fol. 47] b. The transcript of the trial in the *Davis* case, pp. 16 through 30 may be omitted. (The Clerk will please print a notation to the effect that the parties stipulate that the trial transcript in the *Davis* case is identical to that in the *Gober* case.)

4. Print the entire record of the proceedings in the Alabama courts in the case of *Roy Hutchinson v. City of Birmingham*, except that the following items may be omitted:

a. The items listed in paragraph 2a through 2h above.

5. Print the entire record of the proceedings in the Alabama courts in the case of *Robert J. King* v. *City of Birmingham*, except that the following items may be omitted:

a. The items listed in paragraph 2a through 2h above.

b. The trial transcript, pp. 16 through 33. (The Clerk will please print a notation to the effect that the parties stipulate that the trial transcript in the *King* case is identical to that in the *Hutchinson* case.)

c. The petition for a writ of certiorari filed in the Supreme Court of Alabama may be omitted. (The Clerk will please print a notation to the effect that the parties stipulate that the petition filed in the Alabama Supreme Court

in the *King* case is identical to that filed in the *Hutchinson* case.)

6. Print the entire record of the proceedings in the Alabama courts in the case of *Robert Parker* v. *City of Birmingham*, except that the following items may be omitted:

a. The items listed in paragraph 2a through 2h above.

7. Print the entire record of the proceedings in the Alabama courts in the case of *William West* v. *City of Birmingham*, except that the following items may be omitted:

a. The items listed in paragraph 2a through 2h above.

b. The trial transcript in the *West* case, pp. 13 through [fol. 48] 32, may be omitted. (The Clerk will please print a notation to the effect that the parties stipulate that the transcript of the trial proceedings in the *West* case is identical to the transcript in the *Parker* case.)

c. The petition for a writ of certiorari filed in the Supreme Court of Alabama may be omitted. (The Clerk will please print a notation that the parties stipulate that the petition filed in the Alabama Supreme Court in the *West* case is identical to that filed in the *Parker* case.)

8. Print the entire record of the proceedings in the Alabama courts in the case of *Robert D. Sanders* v. *City of Birmingham*, except that the following items may be omitted:

a. The items listed in paragraph 2a through 2h above.

9. Print the entire record of the proceedings in the Alabama courts in the case of *Roosevelt Westmoreland* v. *City of Birmingham*, except that the following items may be omitted:

a. The items listed in paragraph 2a through 2h above.

b. The trial transcript, pp. 13 through 24, may be omitted. (The Clerk will please print a notation that the parties stipulate that the trial transcript in the *Westmoreland* case is identical to that in the *Sanders* case.)

c. The petition for a writ of certiorari filed in the Supreme Court of Alabama may be omitted. (The Clerk will please make a notation that the parties stipulate that the petition filed in the Alabama Supreme Court in the *Westmoreland* case is identical to that filed in the *Sanders* case.)

10. Print the entire record of the proceedings in the Alabama courts in the case of *Jessie Walker* v. *City of Birmingham*, except that the following items may be omitted:

a. The items listed in paragraph 2a through 2h above.

[fol. 49] 11. Print the entire record of the proceedings in the Alabama courts in the case of *Willie J. Willis* v. *City of Birmingham*, except that the following items may be omitted:

a. The items listed in paragraph 2a through 2h above.

b. The trial transcript, pp. 13 through 24, may be omitted. (The Clerk will please print a notation to the effect that the parties stipulate that the trial transcript in the *Willis* case is identical to that in the *Walker* case.)

c. The petition for a writ of certiorari filed in the Supreme Court of Alabama may be omitted. (The Clerk will please make a notation that the parties stipulate that the petition filed in the Alabama Supreme Court in the *Willis* case is identical to that filed in the *Walker* case.)

12. Print this stipulation.

Jack Greenberg, James M. Nabrit, III, Attorneys for Petitioners.

Watts E. Davis, Earl McBee, Attorneys for Respondents.

of One Hundred ($100.00) dollars and costs against said defendant. It is therefore considered by the Court, and it is the judgment of the Court that said defendant is guilty as charged in said Complaint, and that he pay a fine of One Hundred ($100.00) dollars and costs of this cause.

And said defendant being now in open Court, and having presently failed to pay the fine of $100.00 and the costs of $5.00 accrued in the Recorder's Court of the City of Birmingham, or to confess judgment with good and sufficient security for the same, it is therefore considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said William West, perform hard labor for the City of Birmingham for fifty-two days, because of his failure to pay said fine and costs of $5.00 accrued in said Recorder's Court, or to confess judgment with good and sufficient security therefor.

[fol. 6] It is further considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said William West, perform additional hard labor for the City of Birmingham for thirty days, as additional punishment in this cause.

And the costs legally taxable against the defendant in this cause amounting to fifty-two and 10/100 ($52.10) dollars, not being presently paid or secured, and $4.00 of said amount being State Trial Tax, $3.00, and Law Library Tax, $1.00, leaving forty-eight and 10/100 ($48.10) dollars taxable for sentence, it is ordered by the Court that said defendant perform additional hard labor for the County for sixty-four days, at the rate of 75¢ per day to pay said costs. It is therefore ordered by the Court that after the sentence for the City of Birmingham has expired, that the City authorities return the defendant to the County authorities to execute said sentence for costs.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in this behalf expended for feeding the defendant while in jail, for which let execution issue.

And on this the 11th day of October, 1960, the defendant files motion for a new trial in this cause, and said motion

coming on to be heard and determined by the Court it is ordered by the Court, and it is the judgment of the Court that said motion be and the same is hereby overruled.

And notice of appeal being given, and it appearing to the Court that, upon the trial of this cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Appeals of Alabama, it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at $300.00, conditioned as required by Law.

[fol. 7]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20797

CITY OF BIRMINGHAM, a Municipal Corporation, Plaintiff,

vs.

WILLIAM WEST, Defendant.

MOTION FOR A NEW TRIAL—Filed October 11, 1960

Now comes the defendant, in the above styled cause and with leave of the Court, first had and obtained, and moves this Honorable Court to set aside the verdict and judgment rendered on to-wit, the 11th day of October, 1960, and that this Honorable Court will grant the defendant a new trial, and as grounds for said motion sets out and assigns the following, separately and severally:

1. That the judgment of the Court in said case is contrary to the law.

2. For that the judgment of the Court is contrary to the facts.

3. For that the judgment of the Court is contrary to the law in the case.

4. In that the judgment of the Court is not sustained by the great preponderance of the evidence in the case.

5. For that the judgment of the Court is not sustained by the great preponderance of the evidence in the case.

6. For that the judgment of the Court is so unfair, as to constitute a gross miscarriage of justice.

7. For that the sentence is excessive.

8. For that the Court erred in overruling objections, by the defendant to the introduction of evidence offered on behalf of the City of Birmingham, Alabama, in this case.

9. For the Court erred in overruling objections by the defendant to the introduction of evidence which was so biased and prejudiced that the defendant was denied the right of a fair and impartial trial.

10. The Court erred in overruling defendant's demurrers filed in this cause.

11. The Court erred in overruling the defendant's Motion to Strike the Complaint in this cause.

12. The Court erred in finding the defendant guilty of violating the laws of ordinances of the City of Birmingham, Alabama, in that the laws or ordinances, under which this defendant was charged and convicted, and as applied [fol. 8] to this defendant, constituted an abridgement of freedom of speech violative of rights and liberties secured to the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

13. That the Court erred in refusing to find that the ordinance under which this defendant was being tried, as applied to this defendant, constituted a denial of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

14. That the Court erred in finding the defendant guilty of violating the laws or ordinances of the City of Birmingham, Alabama, in that the laws or ordinances under which this defendant was charged and convicted, and as applied to this defendant, constituted a deprivation of liberty without due process of law, in violation of the Constitution of the State of Alabama, and the provisions of the Fourteenth Amendment to the United States Constitution.

15. The Court erred in overruling defendant's Motion to exclude the evidence in this cause.

16. That it appeared from the evidence that no owner of the premises involved had caused the arrest and prosecution of the defendant, but that such arrest was procured by the officials of the City of Birmingham, Alabama, without first having a complaint from such owner, or other person in charge of such premises.

17. For that it appears from the evidence that the defendant was not prosecuted by the owner of private property, as provided for by the pertinent laws or ordinances of the City of Birmingham, but by police officials.

18. For that it appears from the evidence affirmatively that no owner or other person in charge of the premises involved, or otherwise, having authority to do so, procured the arrest of the defendant or signed a complaint or swore out a warrant against the defendant for trespass on private property.

19. For that it affirmatively appears that the defendant was not requested to leave the premises of the store involved, but was only told to go elsewhere in said store.

Oscar W. Adams, Jr., Arthur D. Shores, Orzell Billingsley, Jr., J. Richmond Pearson, Peter A. Hall
Attorneys for Defendant.

[fol. 9]

ORDER OVERRULING

The foregoing Motion being presented in open Court, this the 11th day of October, 1960; the same being considered and understood, the Court is of the opinion that the same should be overruled.

It is therefore, Ordered, Adjudged and Decreed that the said Motion is hereby overruled.

Geo. Lewis Bailes, Circuit Judge.

Appeal Bond to Court of Appeals (omitted in printing).

[fol. 11] Transcript of Evidence—October 10, 1960 (omitted in printing).

Counsel's Note Re Record

The parties stipulate that the transcript of the trial proceedings in the *West* case is identical to the transcript in the *Parker* case.

[fol. 33] Transcript of Sentencing (omitted in printing).

[fol. 38] Reporter's and Clerk's Certificates to foregoing transcript (omitted in printing).

[fol. 40]

In the Court of Appeals of Alabama

No. .....

William West, Appellant,

vs.

The City of Birmingham, Appellee.

Assignment of Errors

The Appellant says that there is manifest error in the foregoing Transcript of the Record of the proceedings, had and done in the Honorable Circuit Court of Jefferson County, Alabama, to the hurt and prejudice of this appellant, and for error, assigns each of the following separately and severally:

1. The Court erred in over-ruling Appellant's Motion to Strike the Complaint filed in this cause, to which ruling the Appellant took exceptions. (Tr. 2, 3, 5 & 13).

2. The Court erred in over-ruling the Appellant's Demurrers filed in this cause, to which the Appellant took exceptions. (Tr. 3, 4, 5 & 13).

3. The Court erred in over-ruling the Appellant's Motion to Exclude the Evidence filed in this cause, to which ruling Appellant took exceptions. (Tr. 5 & 25).

4. The Court erred in over-ruling Appellant's Motion for a New Trial. (Tr. 6, 7, 9 & 37).

5. The Court erred in refusing to permit the witness, Lloyd L. Stalling, Assistant Store Manager of J. J. Newberry Company, to testify as to the racial policies of aforesaid Company, in service of persons of different races to which ruling the defendant took exceptions. (Tr. 22 & 24).

Oscar W. Adam, Jr., Arthur D. Shores, J. Richmond Pearson, Peter A. Hall, Orzell Billingsley, Jr., Attorneys for Appellant.

Certificate of Service (omitted in printing).

[fol. 41]

IN THE COURT OF APPEALS OF THE STATE OF ALABAMA

..... JUDICIAL DEPARTMENT

October Term, 1960-61

6 Div. 804

WILLIAM WEST,

v.

CITY OF BIRMINGHAM.

Appeal from Jefferson Circuit Court

November 2, 1960
Certificate Filed

January 30, 1961
Transcript Filed

April 18, 1961

Come the parties by attorneys, and argue and submit this cause for decision.

ORDER OF AFFIRMANCE—May 30, 1961

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court, there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed, on authority of Gober v. City of Birmingham; 6th Division 797; Ala. App. Ms. It is also considered that the appellant pay the costs of appeal of this court and of the Circuit Court.

[fol. 42] Application for Rehearing and Order Overruling (omitted in printing).

[fol. 42a] Proceedings on Petition for Certiorari (omitted in printing).

[fol. 43] Petition for Certiorari (omitted in printing).

COUNSEL'S NOTE RE RECORD

The parties stipulate that the petition filed in the Alabama Supreme Court in the *West* case is identical to that filed in the *Parker* case.

[fol. 46] Order Denying Petition for Writ of Certiorari (omitted in printing).

[fol. 47] Application for Rehearing (omitting in printing).

[fol. 48] Order Overruling Application for Rehearing (omitted in printing).

[fol. 49] Clerks' Certificates to foregoing transcript (omitted in printing).

[fol. 1]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA
IN AND FOR JEFFERSON COUNTY

No. 20787

CITY OF BIRMINGHAM,

vs.

ROBERT D. SANDERS.

APPEAL BOND (omitted in printing).

[fol. 2]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20787

CITY OF BIRMINGHAM, a Municipal Corporation, Plaintiff,

vs.

ROBERT D. SANDERS, Defendant.

COMPLAINT—Filed October 10, 1960

Comes the City of Birmingham, Alabama, a municipal corporation and complains that Robert D. Sanders, within twelve months before the beginning of this prosecution and within the City of Birmingham or the police jurisdiction thereof, did go or remain on the premises of another said premises being the area used for eating, drinking, and dining purposes and located within the building commonly and customarily known as S. H. Kress & Co. 1900 3rd Avenue, North, Birmingham, Alabama, after being warned

not to do so, contrary to and in violation of Section 1436 of the General City Code of Birmingham of 1944.

Watts E. Davis, Attorney for City of Birmingham.

[File endorsement omitted]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20787

CITY OF BIRMINGHAM,

vs.

ROBERT D. SANDERS.

MOTION TO STRIKE—Filed October 11, 1960

Comes now Robert D. Sanders, defendant in this case, and moves to strike the complaint in this cause, and as grounds for said Motion, sets out and assigns the following, separately and severally:

1. That the complaint, affidavit, etc., is not sworn to.

2. That the allegations of the said complaint are so vague and indefinite, as not to apprise this defendant of what he is called upon to defend.

3. That the ordinance or statute upon which is founded the complaint in this cause, as applied to this defendant, as a citizen of the State of Alabama, and of the United States, constitutes an abridgment of the freedom of assembly, speech and liberties secured to the Defendant, by [fol. 3] the Constitution and laws of the State of Alabama and the Fourteenth Amendment of the Constitution of the United States of America.

4. That the said ordinance or statute which is the basis for the affidavit, information or complaint in this cause, as applied to the defendant, constitutes an abridgment of privileges and immunities guaranteed defendant, as a citi-

zen of the United States, in violation of the Constitution and laws of the State of Alabama, and of the Fourteenth Amendment of the United States Constitution.

5. That Section 824 of the General City Code of the City of Birmingham, as applied to this defendant, a Negro citizen of the United States, constitutes a denial of due process and equal protection of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

6. That the said affidavit, information or complaint, does not charge any offense, which is cognizable by this court.

Arthur D. Shores, J. Richmond Pearson, Orzell Billingsley, Jr., Peter A. Hall, Attorneys for Defendant.

[File endorsement omitted]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20787

CITY OF BIRMINGHAM,

vs.

ROBERT D. SANDERS.

DEMURRERS—Filed October 10, 1960

Comes now Robert D. Sanders, defendant in this cause, and demurs to the complaint in this cause, and to each and every count thereof, separately and severally, and as grounds for such demurrer sets out and assigns the following, separately and severally:

1. The affidavit or information which supports the complaint in this cause, does not charge defendant with any offense under the Constitution and laws of the State of Alabama.

[fol. 4] 2. That the complaint, affidavit or information upon which this cause is based is insufficient to support

prosecution of this cause, in that no offense is charged which is cognizable by this Honorable Court.

3. That the allegations of the complaint and each count thereof are so vague and indefinite as not to apprise this defendant of what he is called upon to defend.

4. That the ordinance, Section 1436 of the 1944 General City Code of Birmingham, Alabama, as applied to this defendant, is invalid in that it violates Section 4, Article 1, of the Constitution of Alabama, and the First and Fourteenth Amendments to the Constitution of the United States of America.

5. That Section 1436 of the 1944 General City Code of Birmingham, Alabama, which supports the complaint, affidavit or information in this cause, as applied to this defendant, a citizen of the State of Alabama and of the United States, constitutes an abridgment of freedom of speech and assembly violative of rights and liberties secured the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

6. That the aforesaid ordinance as applied to defendant, is unconstitutional on its face in that it is so vague as to constitute a deprivation of liberty without due process of law in violation of the provisions of the Fourteenth Amendment to the United States Constitution.

7. That the said Ordinance or Statute in this case, as applied to defendant, constitutes an abridgment of privileges and immunities guaranteed defendant as a citizen of the United States, in violation of the Fourteenth Amendment to the United States Constitution.

8. That the said Ordinance, as applied to defendant, constitutes a denial of equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States of America.

Arthur D. Shores, Orzell Billingsley, Jr., J. Richmond Pearson, Peter A. Hall, Oscar W. Adams, Jr., Attorneys for Defendant.

[File endorsement omitted]

[fol. 5]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20787

CITY OF BIRMINGHAM, Plaintiff,

versus

ROBERT D. SANDERS, Defendant.

MOTION TO EXCLUDE THE EVIDENCE—Filed October 10, 1960

1. The complaint charging defendant, a Negro, with violation of 1436 of the General City Code of Birmingham of 1944, to-wit, an alleged trespass upon land after being forbidden to enter or remain after told to leave is invalid in that the evidence establishes merely that defendant was peacefully upon the premises of Kress, an establishment performing an economic function invested with the public interest, as a customer, visitor, business guest or invitee, and there is no basis for the charge recited by the complaint other than an effort to exclude defendant from Kress' Eating Facilities because of his race or color; defendant, at the same time is excluded from equal service at the preponderant number of other similar eating establishments in Birmingham, Alabama; thereby depriving him of liberty without due process of law and of the equal protection of the laws secured by the 14th Amendment of the United States Constitution.

2. The evidence offered against defendant, a Negro, in support of the complaint charging him with violation of trespass upon land after being forbidden to enter establishes that he was, at the time of arrest and at all times covered by the charge, in peaceful exercise of constitutional rights to assemble with others for the purpose of speaking and protesting against the practice, custom and usage of racial discrimination in Kress, an establishment performing an economic function invested with the public interest;

that defendant peacefully was attempting to obtain service in the facilities of Kress in the manner of white persons similarly situated, and at no time was defendant defiant or in breach of the peace and was at all times upon an area essentially public, wherefore defendant has been denied rights secured by the due process and equal protection clauses of the 14th Amendment of the United States Constitution.

3. The evidence establishes that prosecution of defendant was procured for the purpose of preventing him from engaging in peaceful assembly with others for the purpose of speaking and otherwise peacefully protesting in public places the refusal of the preponderant number of stores, facilities and accommodations open to the public in Birmingham, Alabama, to permit defendant, a Negro, and [fol. 6] other members of defendant's race from enjoying the access to such stores, facilities and accommodations afforded members of other races; and that by this prosecution, prosecuting witnesses and arresting officers are attempting to employ the aid of the Court to enforce a racially discriminatory policy contrary to the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States.

4. The evidence against defendant, a Negro, in support of the complaint charging him with violation of trespass upon land after being forbidden to enter clearly indicates that defendant at the time of his arrest, had accepted an invitation to enter and purchase articles in Kress, a store open to the public, but had not been allowed to obtain food service on the same basis as that offered white persons, because of defendant's race or color; and, that in furtherance of this racially discriminatory practice of Kress, defendant was arrested on the basis of race or color, under color of law, to enforce racially discriminatory policy, thereby violating defendant's rights under the equal protection and due process clauses of the 14th Amendment of the United States Constitution.

5. The statute or ordinance (1436 of the General City Code of Birmingham of 1944) under which defendant, a

Negro, was arrested and charged is unconstitutional on its face by making it a crime to be on public property after being asked to leave by an individual at such individual's whim, in that said statute does not require that the person making the demand to leave present documents or other evidence of possessory right sufficient to apprise defendant of the validity of the demand to leave, all of which renders the statute so vague and uncertain as applied to defendant as to violate his rights under the due process clause of the 14th Amendment of the United States Constitution.

6. Section 1436 of the General City Code of Birmingham of 1944 under which defendant, a Negro, was arrested and charged with violation of trespass upon land after being forbidden to enter is on the evidence unconstitutional as applied to defendant in that it makes it a crime to be on property open to the public after being asked to leave, because of race or color, in violation of defendant's rights under the due process and equal protection clauses of the 14th Amendment of the United States Constitution.

7. The evidence against defendant, a Negro, establishes that he, at the time of arrest and all times covered by the complaint, was a member of the public, peaceably attempting to use a publicly owned facility, to-wit: Kress and from [fol. 7] which defendant was barred because of his race or color; that such denial was in accordance with a policy, custom and usage of Kress, of operating such facilities and services on a racially segregated basis, which policy, custom and usage violates the due process and equal protection clauses of the 14th Amendment of the Constitution of the United States.

8. The evidence offered against the defendant, a Negro, establishes that at the time of arrest and all times covered by the complaint he was a member of the public, attempting to use a facility, Kress, open to the public, which was denied to him solely because of race or color; that ....., was and is offering, for a price, to serve all members of the public with food; that this public facility Kress, is,

along with others of a similar nature, performing a necessary service for the public, which in fact, would have to be provided by the state if ..... and other like facilities were all to withdraw said service; that having determined to offer said valuable service to the public, Kress is required to provide such service in the manner of state operated facilities of a like nature, to-wit: That Kress may not segregate or exclude defendant on the ground of race or color, in violation of the due process and equal protection clauses of the 14th Amendment of the United States Constitution.

Arthur D. Shores, J. Richmond Pearson, Peter A Hall, Orzell Billingsley, Jr., Attorneys for Defendant.

[File endorsement omitted]

[fol. 8]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

Appealed from Recorder's Court

(Trespass After Warning)

Honorable Geo. Lewis Bailes, Judge Presiding

CITY OF BIRMINGHAM,

vs.

ROBERT D. SANDERS.

JUDGMENT ENTRY—October 10, 1960

This the 10th day of October, 1960, came Wm. C. Walker, who prosecutes for the City of Birmingham, and also came the defendant in his own proper person and by attorney, and the City of Birmingham files written Complaint in this cause, and the defendant being duly arraigned upon said

Complaint for his plea thereto says that he is not guilty; and defendant files motion to strike, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion the defendant hereby duly and legally excepts; and the defendant files demurrers, and said demurrers being considered by the Court, it is ordered and adjudged by the Court that said demurrers be and the same are hereby overruled, to which action of the Court in overruling said demurrers the defendant hereby duly and legally excepts; and the defendant files motion to exclude the evidence, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion, the defendant hereby duly and legally excepts; and on this the 11th day of October, 1960, the Court finds the defendant guilty as charged in the Complaint and thereupon assessed a fine of One Hundred ($100.00) dollars and costs against said defendant. It is therefore considered by the Court, and it is the judgment of the Court that said defendant is guilty as charged in said Complaint, and that he pay a fine of One Hundred ($100.00) dollars and costs of this cause.

And said defendant being now in open Court, and having presently failed to pay the fine of $100.00 and the costs of $5.00 accrued in the Recorder's Court of the City of Birmingham, or to confess judgment with good and sufficient security for the same, it is therefore considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said Robert D. Sanders, perform hard labor for the City of Birmingham for fifty-two days, because of his failure to pay said fine and costs of $5.00 accrued in said Recorder's Court, or to confess judgment with good and sufficient security therefor.

[fol. 9] It is further considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said Robert D. Sanders, perform additional hard labor for the City of Birmingham for thirty days, as additional punishment in this cause.

And the costs legally taxable against the defendant in this cause amounting to forty-eight and 75/100 ($48.75) dollars, not being presently paid or secured, and $4.00 of said amount being State Trial Tax, $3.00, and Law Library Tax, $1.00, leaving forty-four and 75/100 ($44.75) dollars for sentence, it is ordered by the Court that said defendant perform additional hard labor for the County for sixty days, at the rate of 75¢ per day to pay said costs. It is further ordered by the Court that after the sentence for the City of Birmingham has expired, that the City authorities return the defendant to the County authorities to execute said sentence for costs.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in this behalf expended for feeding the defendant while in jail, for which let execution issue.

And on this the 11th day of October, 1960, the defendant files motion for a new trial in this cause, and said motion coming on to be heard and determined by the Court, it is ordered by the Court, and it is the judgment of the Court that said motion be and the same is hereby overruled.

And notice of appeal being given, and it appearing to the Court that, upon the trial of this cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Appeals of Alabama, it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at $300.00, conditioned as required by Law.

[fol. 10]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20787

CITY OF BIRMINGHAM, a Municipal Corporation, Plaintiff,

vs.

ROBERT D. SANDERS, Defendant.

MOTION FOR A NEW TRIAL—Filed October 11, 1960

Now comes the defendant, in the above styled cause and with leave of the Court, first had an obtained, and moves this Honorable Court to set aside the verdict and judgment rendered on to-wit, the 11th day of October, 1960, and that this Honorable Court will grant the defendant a new trial, and as grounds for said motion sets out and assigns the following, separately and severally:

1. That the judgment of the Court in said case is contrary to the law.

2. For that the judgment of the Court is contrary to the facts.

3. For that the judgment of the Court is contrary to the law in the case.

4. In that the judgment of the Court is not sustained by the great preponderance of the evidence in the case.

5. For that the judgment of the Court is not sustained by the great preponderance of the evidence in the case.

6. For that the judgment of the Court is so unfair, as to constitute a gross miscarriage of justice.

7. For that the sentence is excessive.

8. For that the Court erred in overruling objections, by the defendant to the introduction of evidence offered on behalf of the City of Birmingham, Alabama, in this case.

9. For the Court erred in overruling objections by the defendant to the introduction of evidence which was so biased and prejudiced that the defendant was denied the right of a fair and impartial trial.

10. The Court erred in overruling defendant's demurrers filed in this cause.

11. The Court erred in overruling the defendant's Motion to Strike the Complaint in this cause.

12. The Court erred in finding the defendant guilty of violating the laws or ordinances of the City of Birmingham, Alabama, in that the laws or ordinances, under [fol. 11] which this defendant was charged and convicted, and as applied to this defendant, constituted an abridgement of freedom of speech violative of rights and liberties secured to the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

13. That the Court erred in refusing to find that the ordinance under which this defendant was being tried, as applied to this defendant, constituted a denial of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

14. That the Court erred in finding the defendant guilty of violating the laws or ordinances of the City of Birmingham, Alabama, in that the laws or ordinances under which this defendant was charged and convicted, and as applied to this defendant, constituted a deprivation of liberty without due process of law, in violation of the Constitution of the State of Alabama, and the provisions of the Fourteenth Amendment to the United States Constitution.

15. The Court erred in overruling defendant's Motion to exclude the evidence in this cause.

16. That it appeared from the evidence that no owner of the premises involved had caused the arrest and prosecution of the defendant, but that such arrest was procured by the officials of the City of Birmingham, Alabama, without

first having a complaint from such owner, or other person in charge of such premises.

17. For that it appears from the evidence that the defendant was not prosecuted by the owner of private property, as provided for by the pertinent laws or ordinances of the City of Birmingham, but by police officials.

18. For that it appears from the evidence affirmatively that no owner or other person in charge of the premises involved, or otherwise, having authority to do so, procured the arrest of the defendant or signed a complaint or swore out a warrant against the defendant for trespass on private property.

19. For that it affirmatively appears that the defendant was not requested to leave the premises of the store involved, but was only told to go elsewhere in said store.

Oscar W. Adams, Jr., Arthur D. Shores, Orzell Billingsley, Jr., J. Richmond Pearson, Peter A. Hall, Attorneys for Defendant.

[fol. 12]

ORDER OVERRULING

The foregoing Motion being presented in open court, this the 11th day of October, 1960; the same being considered and understood, the Court is of the opinion that the same should be overruled.

It is therefore, Ordered, Adjudged and Decreed that the said Motion is hereby overruled.

Geo. Lewis Bailes, Circuit Judge.

[File endorsement omitted]

APPEAL BOND TO COURT OF APPEALS (omitted in printing).

[File endorsement omitted]

[fol. 14]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA
IN AND FOR JEFFERSON COUNTY

No. 20787

THE CITY OF BIRMINGHAM, a Municipal Corporation,

versus

ROBERT D. SANDERS.

Birmingham, Alabama

Transcript of Evidence—October 10, 1960

BEFORE: Honorable George L. Bailes, Judge.

APPEARANCES:

For the City, Mr. Watts E. Davis.

For the Defendant, Messrs. A. D. Shores, Orzell Billingsley, Jr., Peter A. Hall, Oscar W. Adams, Jr., J. Richmond Pearson.

[fol. 16]

PROCEEDINGS

Mr. Davis: Mr. Caldwell.

J. P. CALDWELL, called as a witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Davis:

Q. Will you state your full name?
A. J. P. Caldwell.
Q. By whom are you employed?
A. City of Birmingham.

Q. Were you so employed on March 31, 1960?

A. Yes, sir.

Q. I will ask you if you had orders or received a call to go to the Kress 5 and 10c Store on the morning of March 31, 1960?

A. Yes, sir.

Q. When you arrived there did you go near the eating area or luncheonette area?

A. In the basement, yes, sir.

Q. What did you observe, if anything unusual on that occasion there?

A. Officer Thompson and I went downstairs in the basement. The lunchroom was closed. The lights were out. We observed two black males Roosevelt Westmoreland and Robert D. Sanders sitting there.

Q. Did you on that occasion put the two boys under arrest?

A. Yes, sir.

Q. Do you see those two boys in the Courtroom?

A. Yes, sir.

Q. Are they the defendants sitting between counsel here at my right?

A. Yes, sir.

Q. Was any statement made by any person employed [fol. 17] by Kress' in the presence and hearing of these two defendants that morning?

A. There was by Mr. Braswell.

Q. Who is he?

A. He is Manager of the lunch counter, Kress' lunch counter, and there was another gentleman in his presence also. I didn't get his name.

Q. What, if anything, did you hear Mr. Braswell say to the two defendants on this occasion?

A. Mr. Braswell told us in the presence of the defendants here that they couldn't be served and he had turned the lights out and closed the counter.

Q. You then put them under arrest?

A. Yes, sir.

Q. Was this in the City of Birmingham?

A. Yes, sir.

Q. Second Avenue between 19th and 20th Street.

A. Third Avenue.

Q. That is on the corner of Third Avenue and 19th Street North?

A. Yes, sir.

Mr. Davis: That is all. Thank you.

Cross examination.

By Mr. Hall:

Q. Officer Caldwell, did Mr. Braswell tell the defendants to leave the lunch counter?

A. He told them they couldn't be served, that the counter was closed.

Q. Did he tell them to leave the lunch counter?

A. I don't know whether he did or not.

Q. You didn't hear him say that?

A. No, I didn't.

Q. Did he ask you to arrest them?

A. No, he didn't.

Q. Did anyone in Kress' ask you to put them under arrest?

[fol. 18] A. No, they didn't.

Q. Did you hear anyone at Kress' ask them to leave the lunch counter?

A. No, I didn't.

Mr. Hall: That is all.

Mr. Davis: Mr. Pearson.

Albert J. Pearson, called as a witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Davis:

Q. Will you state to the Court your full name?

A. Albert J. Pearson.

Q. Are you employed by S. H. Kress & Company?

A. Yes, sir.

Q. Were you employed on March 31, of this year?

A. Yes.

Q. In what capacity were you employed then Mr. Pearson?

A. Steward or Manager.

Q. Are your services concerned directly with the lunch counter or the eating counter?

A. Yes, sir.

Q. Do your duties involve over-all supervision of the counter, purchasing and personnel problems and so forth?

A. Yes, sir.

Q. Would you say that was equivalent to being Manager in that department?

A. Yes, sir.

Q. On the morning of March 31, of this year did you have occasion to observe two colored boys present in the eating area?

A. Yes, sir.

Q. Were they seated?

A. Yes, sir.

[fol. 19] Q. Did you have any conversation with either or both of these boys?

A. Yes, sir.

Q. What was that conversation, Mr. Pearson?

A. I approached them from the inside of the bay that they were sitting and informed the boys that the bay was closed and I put up a closed sign and told them we couldn't serve them and they would have to leave.

Q. When you say bay, is the counter shaped in a series of arcs or different sections?

A. Yes, sir.

Q. When you say bay you are speaking of one section?

A. One section.

Q. You say you turned off the light in the bay in which they were sitting?

A. Yes, sir.

Q. What did they do after the light was turned off and you heard the first conversation with them?

A. After placing the closed signs in that bay I went to the back and cut the light out and as I came back out the boys had moved from that bay and sat down in bay number two.

Q. What did you do at that time?

A. I approached them again and said, "Boys you will have to leave because I can't serve you and the bay is closed. We are closing." And I proceeded as I told them that I was putting up closed signs on that bay.

Q. What did they do after that conversation?

A. Which one it was as I turned I don't remember but one of the boys said, "Well, we have our rights." And with that I proceeded to call the Manager of the store.

Q. Did he have any conversation, the Manager, with these boys in your presence?

A. When he came down the lunch department is in the basement, when he came down and approached the counter, [fol. 20] he asked me had I asked them to leave.

Q. Did he say anything to these two boys?

A. Yes, sir.

Q. What was it?

Mr. Billingsley: I am going to object to that as purely hearsay.

Mr. Davis: I am talking about a statement made in this man's presence to the two defendants. What was the statement Mr. Braswell made to these two boys in your presence?

A. He asked them to leave the store.

Q. Did they respond in any way?

A. No, sir.

Q. Did the police ultimately come and place the boys under arrest?

A. As I turned around, the Manager and I turned around to walk away from the boys, the police came in and asked them to get up and I think the first time they asked them that they still didn't get up and then they told the boys to please get up and with that three or four more policemen come between us and the two officers who approached the boys and they carried them out of the store.

Q. When you say carried you mean lifted them up?

A. No, escorted them out. I am sorry.

Mr. Davis: That is all.

Cross examination.

By Mr. Hall:

Q. Mr. Braswell is the General Manager of the Kress Store?

A. That is right.

Q. And you had told the boys to leave?

A. Yes, sir.

Q. Did you mean to leave the store?

A. To leave the area. The lunch department is enclosed in a railing, they would have to leave that section.

[fol. 21] Q. To leave that section yes. Not the store?

A. The store was not mentioned.

Q. How many bays are there in the lunch facilities?

A. Four.

Q. Did you close all of the bays?

A. Yes, sir.

Q. You closed the entire lunchroom area?

A. After the boys moved to the second bay and I closed the lights for that bay and I also closed down the other three bays.

Q. And this was because they would not leave, is that why you closed the lunchroom area?

A. I closed on orders of the Manager.

Q. You had already talked with the Manager?

A. That is right.

Q. Did you call the police?

A. I personally, no.

Q. Did Mr. Braswell call them in your presence?

A. Not in my presence.

Q. Did you ask the police to arrest these boys?

A. Not personally.

Q. Did Mr. Braswell request it in your presence?

A. Not in my presence.

Q. Did you sign a complaint or affidavit against these boys down at the Police Department?

A. No.

Q. You have not signed one at all?

A. No.

Q. Do you know if Mr. Braswell signed one?

A. I can't answer that truthfully, I don't know.

Q. Did Mr. Braswell sign one on the occasion in your presence?

A. In my presence, nothing was signed.

Q. So far as you know he has not signed one since or requested arrest?

A. Whether he signed or hasn't signed I couldn't tell you.

[fol. 22] Q. You don't know?

A. No.

Q. Is Mr. Braswell here today?

A. In the Courtroom?

Q. In the Courtroom?

A. No.

Q. Is he here as a witness?

A. I can't answer that.

Q. You haven't seen him here?

A. Not in the Courtroom.

Q. Did you testify in the previous hearing in the City Court?

A. No—for this case?

Q. Yes.

A. No.

Q. This is the first time that you have testified?

A. Yes.

Q. Are you still employed by Kress'?

A. Yes.

Q. In the same capacity?

A. Yes.

Q. Tell us is the Kress store a general department store selling merchandise to the buying public?

A. Yes.

Q. Do they advertise in local newspapers and other media?

A. They do some advertising. To what extent I don't really keep up with.

Q. The advertising you have seen some advertising?

A. For Kress' yes.

Q. Is that advertising beamed to the general buying public?

A. I would assume so.

Q. Does it request or invite persons to come into Kress' Store and buy merchandise?

[fol. 23] A. I wouldn't say it invites. It advertises that the merchandise is there for sale.

Q. You wouldn't say that that is an invitation to come to buy?

A. Well that is a fine point if I might quote an opinion as to inviting somebody.

Q. The whole purpose is to invite the buying public to come in and buy?

A. I would assume so.

Q. You understand that to be the case?

Mr. Davis: We object to that.

Mr. Hall: We withdraw the question.

Q. As Manager of the lunch counter have you had any advertising in the local newspapers with reference to what you have to sell?

A. About three ads in nine years.

Q. About three ads in nine years. Do you recall those ads? Do you recall generally? They advertised food or sundries of some type for sale at Kress' luncheonette?

A. That is right.

Q. Advertisements placed in the local newspapers is that so?

A. Yes.

Q. Do you have any facilities in your store for colored customers alone?

A. No.

Q. Is your lunch facilities at Kress for the customers who come in Kress'?

A. Yes.

Q. When you advertise do you advertise for white customers to come in and buy sundries and food or just advertise generally?

A. We advertise generally.

Q. You don't specifically, don't specify whether it is white or colored?

A. No.

[fol. 24] Q. Well now does Kress have white and colored customers ordinarily, not in the lunchroom but generally?

A. Yes.

Q. Do you observe colored and white persons at the candy counters in Kress' buying candy?

A. Yes.

Q. Do they buy from the same counter?

A. Yes.

Q. And they buy generally at the other departments, at the notions. Is that right?

A. Well that is placing me in a lot of departments in the store out of my own. When I walk through the store they are purchasing. Whether I stop and see that they make the actual purchases, I don't.

Q. But you have seen colored and white customers trading at Kress' together?

A. Yes.

Q. For how many years have you worked for the local Kress Store?

A. Nine years.

Q. And during that nine-year period you have seen white and colored customers trading together at Kress' Store?

A. That is right.

Q. And you do advertise in the local newspaper at least three or four times a year you say?

A. No, about three times in nine years.

Q. When you do advertise you advertise your luncheonette or your business?

A. No, the last time I just advertised apple pies at the bakery counter.

Q. Apple pies at the bakery counter. Have you advertised malted milks for 15¢ on some occasion?

A. Just on the opening day.

Q. When you do there is no racial tag on it?

[fol. 25] A. No.

Q. It is beamed to the general buying public?

A. Right.

Q. Have you had occasion to close down your luncheon facilities before?

A. Yes.

Q. This was not the first time you did it?

A. No.

Q. On this occasion you closed them down immediately after you observed the two boys sitting at the counter, is that true?

A. That is right. I didn't close it until after I told them they couldn't be served and then I closed.

Q. You asked them to leave?

A. Right.

Q. They would not leave and so then you closed the facilities?

A. Right.

Q. How long did they stay there before the police came?

A. Well I closed down one section and as I was walking back from the dish room to the last lunch area I observed them having moved from one bay to the second bay and I again approached the boys and told them we had closed, we couldn't serve them and they would have to leave and I went back to cut out the lights not only for the second bay but all of the other bays.

Q. How long did they stay there then?

A. Until the police arrived.

Q. Do you have an opinion as to the length of time?

A. No because my kitchen was calling me for preparation of food and it was between fifteen and twenty-five minutes I guess. Time with me escapes.

Q. Just prior to closing your counter were there other persons seated there?

A. At that particular counter?

Q. Within the rail at the closed facility?

[fol. 26] A. I would say between three and five people in the whole department.

Q. And when the boys sat down there were other persons there before you closed up, is that true?

A. They were eating, yes, sir, or having coffee.

Q. Did everyone leave when you closed except these two boys?

A. Everyone I think except for an elderly woman who finished her sandwich and left.

Q. Was she sitting there when the police came?

A. I don't recall whether she was sitting or walking out.

Q. But she did remain after you closed the facilities?

A. Yes.

Q. Was she arrested?

A. I couldn't answer that. I don't know.

Q. So far as you know she was not, is that true?

A. As far as I know she was not. I don't know whether she was.

Q. You haven't been called upon to bear witness against her, have you?

A. No.

Q. Is there a luncheonette on the first floor?

A. I beg your pardon?

Q. Is there a luncheonette on the first floor?

A. No.

Q. The entire facilities is in the basement?

A. Right.

Q. At the bakery counter you do serve colored persons, is that true?

A. Yes, to take out.

Q. Do you have charge also of the candy?

A. No.

Q. Have you had occasion to sell colored persons any food at all at the luncheon counter to carry out?

A. We have a carry-out service.

[fol. 27] Q. You have a carry-out service?

A. Sure, a delivery boy.

Q. Assume that some colored person would come in and purchase to carry out food, do you solicit that?

A. Yes, to carry out.

Q. To carry out?

A. Yes.

Q. But you do not sell colored persons to sit and eat is that true?

A. No.

Mr. Hall: That is all.

Mr. Davis: That is all.

[fol. 28] Transcript of Sentencing (omitted in printing).

[fol. 33] Reporter's and Clerk's Certificates to foregoing transcript (omitted in printing).

[fol. 35]

IN THE COURT OF APPEALS OF ALABAMA

ROBERT D. SANDERS, Appellant,

vs.

THE CITY OF BIRMINGHAM, Appellee.

ASSIGNMENT OF ERRORS

The Appellant says that there is manifest error in the foregoing Transcript of the Record of the proceedings, had and done in the Honorable Circuit Court of Jefferson County, Alabama, to the hurt and prejudice of this appellant, and for error, assigns each of the following separately and severally:

1. The Court erred in overruling Appellant's Motion to Strike the Complaint filed in this cause, to which ruling the appellant took exceptions. (Tr. 2, 3 & 8)

2. The Court erred in overruling the Appellant's Demurrers filed in this cause, to which the Appellant took exceptions. (Tr. 3, 4 & 8)

3. The Court erred in overruling the Appellant's Motion to Exclude the Evidence filed in this cause, to which ruling Appellant took exceptions. (Tr. 5, 7 & 8)

4. The Court erred in overruling Appellant's Motion for a New Trial. (Tr. 9, 10 & 12)

Arthur D. Shores, Peter A. Hall, Orzelf Billingsley, Jr., Oscar W. Adams, Jr., J. Richmond Pearson, Attorneys for Appellant.

Certificate of Service (omitted in printing).

[fol. 36]

IN THE COURT OF APPEALS OF THE STATE OF ALABAMA

..... JUDICIAL DEPARTMENT

October Term, 1960-61

6 Div. 801

ROBERT D. SANDERS,

v.

CITY OF BIRMINGHAM.

Appeal from Jefferson Circuit Court

November 2, 1960
Certificate Filed

January 30, 1961
Transcript Filed

April 18, 1961

Come the parties by attorneys, and argue and submit this cause for decision.

ORDER OF AFFIRMANCE—May 30, 1961

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court, there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed, on authority of Gober v. City of Birmingham, 6th Division 797, Ala. App. Ms. It is also considered that the appellant pay the costs of appeal of this court and of the Circuit Court.

[fol. 37] Application for Rehearing and Order Overruling (omitted in printing).

[fol. 37a] Proceedings on Petition for Certiorari (omitted in printing).

[fol. 38]

IN THE SUPREME COURT OF ALABAMA

No. 755 Sixth Division

EX PARTE: ROBERT D. SANDERS

ROBERT D. SANDERS, Appellant,

vs.

CITY OF BIRMINGHAM, Appellee.

PETITION FOR CERTIORARI—Filed July 3, 1961

To the Honorable Chief Justice and Associate Justices of the Supreme Court of Alabama

1. Comes the Appellant, by and through his Attorneys, Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, and J. Richmond Pearson, and respectfully petitions this Honorable Court to review, revise, reverse and hold for naught that certain Judgment of the Court of Appeals, on to-wit: May 30, 1961, wherein Robert D. Sanders was Appellant and the City of Birmingham was Appellee, which Judgment affirms the Judgment of the Circuit Court of Jefferson County, Alabama.

2. Your petitioner avers that application to the Court of Appeals for a Rehearing of said cause and Brief in Support thereof were duly filed by your petitioner within the time required by law, and that said application for rehearing was overruled by said Court of Appeals on the 20th day of June, 1961.

3. Your petitioner respectfully shows unto the Court that this cause arose from a complaint filed by the City of Birmingham, charging your petitioner with violating Section 1436 of the General City Code of Birmingham, viz:

> "Any person who enters into the dwelling house or goes or remains on the premises of another, after being

warned not to do so, shall on conviction, be punished as provided in Section 4, provided that this section shall not apply to police officers in discharge of official duties."

4. Your petitioner filed a Motion to Quash the Complaint and Demurrers to the Complaint, on grounds that the Complaint was so vague and indefinite as not to apprise the Appellant of what he was called upon to defend, and further, that the ordinance which formed the basis of prose-
[fol. 39] cution, as applied to appellant, constituted an abridgement of the privileges and immunities guaranteed by the Constitution of the United States and that the ordinance was unconstitutional on its face.

5. The Court overruled the Motion to Quash and the Demurrers whereupon petitioner was tried without a jury, and was found guilty of Trespass after Warning; and fined One Hundred ($100.00) Dollars and costs, and sentenced to a term of Thirty (30) days of hard labor for the City of Birmingham.

6. Your petitioner filed a Motion to Exclude the Evidence, at the close of the City's case, which Motion was denied. After judgment and sentence, petitioner filed a Motion for a New Trial, which Motion was denied, and petitioner perfected his appeal.

7. Your petitioner further shows unto Your Honors that the Court of Appeals erred in affirming and failing to reverse said cause, in the following ways, to-wit: The Court based its judgment in this cause upon the opinion judgment rendered in the case of James Gober vs. City of Birmingham, Sixth Division—797, decided May 30, 1961, which case had a different factual situation from petitioner's case; and there was a different proposition of law involved in petitioner's case, not involved in case of Gober v. City of Birmingham.

8. That the Propositions of Law involved, which petitioner claims should be reviewed and revised by this Court, are as follows:

A. That the Ordinance and Complaint, the basis of the prosecution, are unconstitutional on their face, that they are so vague, indefinite and uncertain as to constitute a deprivation of liberty, without due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

B. That the Ordinance and Complaint, the basis of the prosecution, as applied to petitioner, constitute an abridgement of the privileges and immunities, and a denial of the equal protection of the laws, all in violation of the Fourteenth Amendment to the United States Constitution.

C. That to warrant a conviction, the evidence must identify the accused, as the person who committed the crime.

[fol. 40] The Court of Appeals erred in failing to rule that the conviction of petitioner was a violation of due process of law, an abridgement of the privileges and immunities, equal protection of the law, and a violation of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, Your petitioner most respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals of Alabama, commanding and requiring said Court to certify and send to this Court, on a day certain to be designated by this Court, a full and complete transcript of record, and all proceedings of said Court of Appeals of Alabama, in the Cause numbered and entitled aforesaid, to the end that this cause may be reviewed and determined by this Honorable Court, as provided by law and the rules and practice of this Court, and that this Court thereupon proceed to review and correct the errors complained of and to reverse the Judgment of the Court of Appeals or render such Judgment as said Court should have rendered.

Petitioner prays that this Honorable Court suggest and require the Court of Appeals to Stay or recall its Certificate of Affirmance of said cause, during the pendency of this petition.

And petitioner prays for such other, further and additional relief in the premises, as to this Court may seem appropriate, and to which he may be entitled, and your petitioner will ever pray.

Respectfully submitted,

Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, J. Richmond Pearson, By Arthur D. Shores, Attorneys for Appellant.

[fol. 41] *Duly sworn to by Arthur D. Shores, jurat omitted in printing.*

Certificate of Service (omitted in printing).

[fol. 42] Order Denying Petition for Writ of Certiorari (omitted in printing).

[fol. 43] Application for Rehearing (omitted in printing).

[fol. 44] Order Overruling Application for Rehearing (omitted in printing).

[fol. 45] Clerks' Certificates to foregoing transcript (omitted in printing).

[fol. 1]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA IN AND FOR JEFFERSON COUNTY

No. 20792

THE CITY OF BIRMINGHAM,

vs.

ROOSEVELT WESTMORELAND.

APPEAL BOND (omitted in printing)

[fol. 2]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20792

CITY OF BIRMINGHAM, a Municipal Corporation, Plaintiff,

vs.

ROOSEVELT WESTMORELAND, Defendant.

COMPLAINT—Filed October 10, 1960

Comes the City of Birmingham, Alabama, a municipal corporation and complains that Roosevelt Westmoreland, within twelve months before the beginning of this prosecution and within the City of Birmingham or the police jurisdiction thereof, did go or remain on the premises of another, said premises being the area used for eating, drinking, and dining purposes and located within the building commonly and customarily known as S. H. Kress & Co., 1900 3rd Avenue, North, Birmingham, Alabama, after being warned not to do so, contrary to and in violation of Section 1436 of the General City Code of Birmingham of 1944.

Watts E. Davis, Attorney for City of Birmingham.

[File endorsement omitted]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20792

CITY OF BIRMINGHAM,

vs.

ROOSEVELT WEST MORELAND.

MOTION TO STRIKE—Filed October 10, 1960

Comes now Roosevelt West Moreland, defendant in this cause, and moves to strike the complaint in this cause, and as grounds for said Motion, sets out and assigns the following, separately and severally:

1. That the complaint, affidavit, etc., is not sworn to.

2. That the allegations of the said complaint are so vague and indefinite, as not to apprise this defendant of what he is called upon to defend.

3. That the ordinance or statute upon which is founded the complaint in this cause, as applied to this defendant, as a citizen of the State of Alabama, and of the United [fol. 3] States, constitutes an abridgment of the freedom of assembly, speech and liberties secured to the Defendant, by the Constitution and laws of the State of Alabama and the Fourteenth Amendment of the Constitution of the United States of America.

4. That the said ordinance or statute which is the basis for the affidavit, information or complaint in this cause, as applied to the defendant, constitutes an abridgment of privileges and immunities, guaranteed defendant, as a citizen of the United States, in violation of the Constitution and laws of the State of Alabama, and of the Fourteenth Amendment of the United States Constitution.

5. That Section 824 of the General City Code of the City of Birmingham, as applied to this defendant, a Negro citi-

zen of the United States, constitutes a denial of due process and equal protection of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

6. That the said affidavit, information or complaint, does not charge any offense, which is cognizable by this Court.

Arthur D. Shores, J. Richmond Pearson, Orzell Billingsley, Jr., Peter A. Hall, Attorneys for Defendant.

[File endorsement omitted]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20792

CITY OF BIRMINGHAM,

vs.

ROOSEVELT WEST MORELAND.

DEMURRERS—Filed October 10, 1960

Comes now Roosevelt West Moreland, defendant in this cause, and demurs to the complaint in this cause, and to each and every count thereof, separately and severally, and as grounds for such demurrer sets out and assigns the following, separately and severally:

1. The affidavit or information which supports the complaint in this cause, does not charge defendant with any [fol. 4] offense under the Constitution and laws of the State of Alabama.

2. That the complaint, affidavit or information upon which this cause is based is insufficient to support prosecution of this cause, in that no offense is charged which is cognizable by this Honorable Court.

3. That the allegations of the complaint and each count thereof are so vague and indefinite as not to apprise this deefndant of what he is called upon to defend.

4. That the ordinance, Section 1436 of the 1944 General City Code of Birmingham, Alabama, as applied to this defendant, is invalid in that it violates Section 4, Article 1, of the Constitution of Alabama, and the First and Fourteenth Amendments to the Constitution of the United States of America.

5. That Section 1436 of the 1944 General City Code of Birmingham, Alabama, which supports the complaint, affidavit or information in this cause, as applied to this defendant, a citizen of the State of Alabama and of the United States, constitutes an abridgment of freedom of speech and assembly violative of rights and liberties secured the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

6. That the aforesaid ordinance as applied to defendant, is unconstitutional on its face in that it is so vague as to constitute a deprivation of liberty without due process of law in violation of the provisions of the Fourteenth Amendment to the United States Constitution.

7. That the said Ordinance or Statute in this case, as applied to defendant, constitutes an abridgment of privileges and immunities guaranteed defendant as a citizen of the United States, in violation of the Fourteenth Amendment to the United States Constitution.

8. That the said Ordinance, as applied to defendant, constitutes a denial of equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States of America.

Arthur D. Shores, Orzell Billingsley, Jr., J. Richmond Pearson, Peter A. Hall, Oscar W. Adams, Jr., Attorneys for Defendant.

[File endorsement omitted]

[fol. 5]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

CITY OF BIRMINGHAM,

vs.

ROOSEVELT WESTMORELAND.

Appealed from Recorder's Court

(Trespass After Warning)

Honorable Geo. Lewis Bailes, Judge Presiding

JUDGMENT ENTRY—October 10, 1960

This the 10th day of October, 1960, came Wm. C. Walker, who prosecutes for the City of Birmingham, and also came the defendant in his own proper person and by attorney, and the City of Birmingham files written Complaint in this cause, and the defendant being duly arraigned upon said Complaint for his plea thereto says that he is not guilty; and defendant files motion to strike, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion the defendant hereby duly and legally excepts; and the defendant files demurrers, and said demurrers being considered by the Court, it is ordered and adjudged by the Court that said demurrers be and the same are hereby overruled, to which action of the Court in overruling said demurrers the defendant hereby duly and legally excepts; and the defendant files motion to exclude the evidence, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion, the defendant hereby duly and legally excepts; and on this the 11th day of October, 1960, the Court finds the defendant guilty as charged in the Complaint and thereupon assessed a fine

of One Hundred ($100.00) dollars and costs against said defendant. It is therefore considered by the Court, and it is the judgment of the Court that said defendant is guilty as charged in said Complaint, and that he pay a fine of One Hundred ($100.00) dollars and costs of this cause.

And said defendant being now in open Court, and having presently failed to pay the fine of $100.00 and the costs of $5.00 accrued in the Recorder's Court of the City of Birmingham, or to confess judgment with good and sufficient security for the same, it is therefore considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said Roosevelt Westmoreland, perform hard labor for the City of Birmingham for fifty-two days, because of his failure to pay said fine and costs of $5.00 accrued in said Recorder's Court, or to confess judgment with good and sufficient security therefor.

It is further considered by the Court, and it is ordered [fol. 6] and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said Roosevelt Westmoreland, perform additional hard labor for the City of Birmingham for thirty days, as additional punishment in this cause.

And the costs legally taxable against the defendant in this cause amounting to fifty-two 55/100 ($52.55) dollars, not being presently paid or secured, and $4.00 of said amount being State Trial Tax, $3.00, and Law Library Tax, $1.00, leaving forty-eight and 55/100 ($48.55) dollars taxable for sentence, it is ordered by the Court that said defendant perform additional hard labor for the County for sixty-five days, at the rate of 75¢ per day to pay said costs. It is further ordered by the Court that after the sentence for the City of Birmingham has expired, that the City authorities return the defendant to the County authorities to execute said sentence for costs.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in this behalf expended for feeding the defendant while in jail, for which let execution issue.

And on this the 11th day of October, 1960, the defendant files motion for a new trial in this cause, and said motion coming on to be heard and determined by the Court, it is ordered by the Court, and it is the judgment of the Court that said motion be and the same is hereby overruled.

And notice of appeal being given, and it appearing to the Court that, upon the trial of this cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Appeals of Alabama, it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at $300.00, conditioned as required by Law.

[fol. 7]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20792

CITY OF BIRMINGHAM, a Municipal Corporation, Plaintiff,

versus

ROOSEVELT WEST MORELAND, Defendant.

MOTION FOR A NEW TRIAL—Filed October 11, 1960

Now comes the defendant, in the above styled cause and with leave of the Court, first had and obtained, and moves this Honorable Court to set aside the verdict and judgment rendered on to-wit, the 11th day of October, 1960, and that this Honorable Court will grant the defendant a new trial, and as grounds for said motion sets out and assigns the following, separately and severally:

1. That the judgment of the Court in said case is contrary to the law.

2. For that the judgment of the Court is contrary to the facts.

3. For that the judgment of the Court is contrary to the law in the case.

4. In that the judgment of the Court is not sustained by the great preponderance of the evidence in the case.

5. For that the judgment of the Court is not sustained by the great preponderance of the evidence in the case.

6. For that the judgment of the Court is so unfair, as to constitute a gross miscarriage of justice.

7. For that the sentence is excessive.

8. For that the Court erred in overruling objections, by the defendant to the introduction of evidence offered on behalf of the City of Birmingham, Alabama, in this case.

9. For the Court erred in overruling objections by the defendant to the introduction of evidence which was so biased and prejudiced that the defendant was denied the right of a fair and impartial trial.

10. The Court erred in overruling defendant's demurrers filed in this cause.

11. The Court erred in overruling the defendant's Motion to Strike the Complaint in this cause.

12. The Court erred in finding the defendant guilty of violating the laws or ordinances of the City of Birmingham, Alabama, in that the laws or ordinances, under which this defendant was charged and convicted, and as applied to [fol. 8] this defendant, constituted an abridgement of freedom of speech violative of rights and liberties secured to the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

13. That the Court erred in refusing to find that the ordinance under which this defendant was being tried, as applied to this defendant, constituted a denial of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

14. That the Court erred in finding the defendant guilty of violating the laws or ordinances of the City of Birming-

ham, Alabama, in that the laws or ordinances under which this defendant was charged and convicted, and as applied to this defendant, constituted a deprivation of liberty without due process of law, in violation of the Constitution of the State of Alabama, and the provisions of the Fourteenth Amendment to the United States Constitution.

15. The Court erred in overruling defendant's Motion to exclude the evidence in this cause.

16. That it appeared from the evidence that no owner of the premises involved had caused the arrest and prosecution of the defendant, but that such arrest was procured by the officials of the City of Birmingham, Alabama, without first having a complaint from such owner, or other person in charge of such premises.

17. For that it appears from the evidence that the defendant was not prosecuted by the owner of private property, as provided for by the pertinent laws or ordinances of the City of Birmingham, but by police officials.

18. For that it appears from the evidence affirmatively that no owner or other person in charge of the premises involved, or otherwise, having authority to do so, procured the arrest of the defendant or signed a complaint or swore out a warrant against the defendant for trespass on private property.

19. For that it affirmatively appears that the defendant was not requested to leave the premises of the store involved, but was only told to go elsewhere in said store.

Oscar W. Adams, Jr., Arthur D. Shores, Orzell Bill-
[fol. 9] ingsley, Jr., J. Richmond Pearson, Peter
A. Hall, Attorneys for Defendant.

ORDER OVERRULING

The foregoing Motion being presented in open Court, this the 11th day of October, 1960; the same being considered and understood, the Court is of the opinion that the same should be overruled.

It is therefore, Ordered, Adjudged and Decreed that the said Motion is hereby overruled.

Geo. Lewis Bailes, Circuit Judge.

[File endorsement omitted]

Appeal Bond to Court of Appeals (omitted in printing).

[fol. 11] Transcript of Evidence—October 10, 1960 (omitted in printing).

Counsel's Note Re Record

The parties stipulate that the trial transcript in the *Westmoreland* case is identical to that in the *Sanders* case.

[fol. 25] Transcript of Sentencing (omitted in printing).

[fol. 30] Reporter's and Clerk's Certificates to foregoing transcript (omitted in printing).

[fol. 32]

In the Court of Appeals of Alabama

Roosevelt Westmoreland, Appellant,

vs.

The City of Birmingham, Appellee.

Assignment of Errors

The Appellant says that there is manifest error in the foregoing Transcript of the Record of the proceedings, had and done in the Honorable Circuit Court of Jefferson County, Alabama; to the hurt and prejudice of this appellant, and for error, assigns each of the following separately and severally:

1. The Court erred in overruling Appellant's Motion to Strike the Complaint filed in this cause, to which ruling the Appellant took exceptions (Tr. 2, 3 & 8)

2. The Court erred in overruling the Appellant's Demurrers filed in this cause, to which the Appellant took exceptions. (Tr. 3, 4 & 8)

3. The Court erred in overruling the Appellant's Motion to Exclude the Evidence filed in this cause, to which ruling Appellant took exceptions. (Tr. 5, 7 & 8).

4. The Court erred in overruling Appellant's Motion for a New Trial. (Tr. 9, 10 & 12)

Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, Jr., J. Richmond Pearson, Attorneys for Appellant.

Certificate of Service (omitted in printing).

[fol. 33]

IN THE COURT OF APPEALS OF THE STATE OF ALABAMA

..... JUDICIAL DEPARTMENT

October Term, 1960-61

6 Div. 805

ROOSEVELT WESTMORELAND,

v.

CITY OF BIRMINGHAM.

Appeal from Jefferson Circuit Court

November 2, 1960
Certificate Filed

January 30, 1961
Transcript Filed

April 18, 1961

Come the parties by attorneys, and argue and submit this cause for decision.

ORDER OF AFFIRMANCE—May 30, 1961

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the court it is considered that in the record and proceedings of the Circuit Court, there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed, on authority of Gober v. City of Birmingham, 6th Division 797, Ala. App. Ms. It is also considered that the appellant pay the costs of appeal of this court and of the Circuit Court.

[fol. 34] Application for Rehearing and Order Overruling (omitted in printing).

[fol. 34a] Proceedings on Petition for Certiorari (omitted in printing).

[fol. 35]

PETITION FOR CERTIORARI (omitted in printing).

COUNSEL'S NOTE RE RECORD

The parties stipulate that the petition filed in the Alabama Supreme Court in the *Westmoreland* case is identical to that filed in the *Sanders* case.

[fol. 38] Order Denying Petition for Writ of Certiorari (omitted in printing).

[fol. 39] Application for Rehearing (omitted in printing).

[fol. 40] Order Overruling Application for Rehearing (omitted in printing).

[fol. 41] Clerks' Certificates to foregoing transcript (omitted in printing).

[fol. 1]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA IN AND FOR JEFFERSON COUNTY

No. 20790

THE CITY OF BIRMINGHAM;

vs.

JESSIE WALKER.

Appeal Bond (omitted in printing).

[fol. 2] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20790

CITY OF BIRMINGHAM, a Municipal Corporation, Plaintiff,

vs.

JESSIE WALKER, Defendant.

COMPLAINT—Filed October 10, 1960

Comes the City of Birmingham, Alabama, a municipal corporation, and complains that Jessie Walker, within twelve months before the beginning of this prosecution and within the City of Birmingham or the police jurisdiction thereof, did go or remain on the premises of another, said premises being the area used for eating, drinking, and dining purposes and located within the building commonly and customarily known as F. W. Woolworth Co., 219 North 19th Street, Birmingham, Alabama, after being warned not to do so, contrary to and in violation of Section 1436 of the General City Code of Birmingham of 1944.

Watts E. Davis, Attorney for City of Birmingham.

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20790

CITY OF BIRMINGHAM,

vs.

JESSE WALKER.

MOTION TO STRIKE—Filed October 10, 1960.

Comes now Jesse Walker, defendant in this cause, and moves to strike the complaint in this cause, and as grounds for said Motion, sets out and assigns the following, separately and severally:

1. That the complaint, affidavit, etc., is not sworn to.

2. That the allegations of the said complaint are so vague and indefinite, as not to apprise this defendant of what he is called upon to defend.

3. That the ordinance or statute upon which is founded the complaint in this cause, as applied to this defendant, as a citizen of the State of Alabama, and of the United States, constitutes an abridgment of the freedom of as- [fol. 3] sembly, speech and liberties secured to the Defendant, by the Constitution and laws of the State of Alabama and the Fourteenth Amendment of the Constitution of the United States of America.

4. That the said ordinance or statute which is the basis for the affidavit, information or complaint in this cause, as applied to the defendant, constitutes an abridgment of privileges and immunities, guaranteed defendant, as a citizen of the United States, in violation of the Constitution and laws of the State of Alabama, and of the Fourteenth Amendment of the United States Constitution.

5. That Section 824 of the General City Code of the City of Birmingham, as applied to this defendant, a Negro citizen of the United States, constitutes a denial of due process

and equal protection of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

6. That the said affidavit, information or complaint, does not charge any offense, which is cognizable by this Court.

Arthur D. Shores, J. Richmond Pearson, Peter A. Hall, Oscar W. Adams, Jr., Orzell Billingsley, Jr., Attorneys for Defendant.

[File endorsement omitted]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20790

CITY OF BIRMINGHAM,

vs.

JESSE WALKER.

DEMURRERS—Filed October 10, 1960

Comes now Jesse Walker, defendant in this cause, and demurs to the complaint in this cause, and to each and every count thereof, separately and severally, and as grounds for such demurrer sets out and assigns the following, separately and severally:

1. The affidavit or information which supports the complaint in this cause, does not charge defendant with any [fol. 4] offense under the Constitution and laws of the State of Alabama.

2. That the complaint, affidavit or information upon which this cause is based is insufficient to support prosecution of this cause, in that no offense is charged which is cognizable by this Honorable Court.

3. That the allegations of the complaint and each count thereof are so vague and indefinite as not to apprise this defendant of what he is called upon to defend.

4. That the ordinance, Section 1436 of the 1944 General City Code of Birmingham, Alabama, as applied to this defendant, is invalid in that it violates Section 4, Article 1, of the Constitution of Alabama, and the First and Fourteenth Amendments to the Constitution of the United States of America.

5. That Section 1436 of the 1944 General City Code of Birmingham, Alabama, which supports the complaint, affidavit or information in this cause, as applied to this defendant, a citizen of the State of Alabama and of the United States, constitutes an abridgment of freedom of speech and assembly violative of rights and liberties secured the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

6. That the aforesaid ordinance as applied to defendant, is unconstitutional on its face in that if is so vague as to constitute a deprivation of liberty without due process of law in violation of the provisions of the Fourteenth Amendment to the United States Constitution.

7. That the said Ordinance or Statute in this case, as applied to defendant, constitutes an abridgment of privileges and immunities guaranteed defendant as a citizen of the United States, in violation of the Fourteenth Amendment to the United States Constitution.

8. That the said Ordinance, as applied to defendant, constitutes a denial of equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States of America.

Arthur D. Shores, Orzell Billingsley, Jr., J. Richard Pearson, Peter A. Hall, Oscar W. Adams, Jr., Attorneys for Defendant.

[File endorsement omitted]

[fol. 5]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20790

CITY OF BIRMINGHAM, Plaintiff,

versus

JESSE WALKER, Defendant.

MOTION TO EXCLUDE THE EVIDENCE—Filed October 10, 1960

1. The complaint charging defendant, a Negro, with violation of 1436 of the General City Code of Birmingham of 1944, to-wit, an alleged trespass upon land after being forbidden to enter or remain after told to leave is invalid in that the evidence establishes merely that defendant was peacefully upon the premises of Woolworth Eating Facilities, an establishment performing an economic function invested with the public interest, as a customer, visitor, business guest or invitee, and there is no basis for the charge recited by the complaint other than an effort to exclude defendants from Woolworth's Eating Facilities because of his race or color; defendant, at the same time is excluded from equal service at the preponderant number of other similar eating establishments in Birmingham, Alabama; thereby depriving him of liberty without due process of law and of the equal protection of the laws secured by the 14th Amendment of the United States Constitution.

2. The evidence offered against defendant, a Negro, in support of the complaint charging him with violation of trespass upon land after being forbidden to enter establishes that he was, at the time of arrest and at all times covered by the charge, in peaceful exercise of constitutional rights to assemble with others for the purpose of speaking and protesting against the practice, custom and usage of racial discrimination in Woolworth's Eating Fa-

cilities, an establishment performing an economic function invested with the public interest; that defendant peacefully was attempting to obtain service in the facilities of Woolworth's Eating Facilities in the manner of white persons similarly situated, and at no time was defendant defiant or in breach of the peace and was at all times upon an area essentially public, wherefore defendant has been denied rights secured by the due process and equal protection clauses of the 14th Amendment of the United States Constitution.

3. The evidence establishes that prosecution of defendant was procured for the purpose of preventing him from engaging in peaceful assembly with others for the purpose of speaking and otherwise peacefully protesting in public places the refusal of the preponderant number of stores, facilities and accommodations open to the public in Bir- [fol. 6] mingham, Alabama to permit defendant, a Negro, and other members of defendant's race from enjoying the access to such stores, facilities and accommodations afforded members of other races; and that by this prosecution, prosecuting witnesses and arresting officers are attempting to employ the aid of the Court to enforce a racially discriminatory policy contrary to the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States.

4. The evidence against defendant, a Negro, in support of the complaint charging him with violation of trespass upon land after being forbidden to enter clearly indicates that defendant at the time of his arrest, had accepted an invitation to enter and purchase articles in Woolworth's Eating Facilities, a store open to the public, but had not been allowed to obtain food service on the same basis as that offered white persons, because of defendant's race or color; and, that in furtherance of this racially discriminatory practice of Woolworth's Eating Facilities, defendant was arrested on the basis of race or color, under color of law, to enforce Woolworth's Eating Facilities racially discriminatory policy, thereby violating defendant's rights under the equal protection and due process

clauses of the 14th Amendment of the United States Constitution.

5. The statute or ordinance (1436 of the General City Code of Birmingham of 1944) under which defendant, a Negro, was arrested and charged is unconstitutional on its face by making it a crime to be on public property after being asked to leave by an individual at such individual's whim, in that said statute does not require that the person making the demand to leave present documents or other evidence of possessory right sufficient to apprise defendant of the validity of the demand to leave, all of which renders the statute so vague and uncertain as applied to defendant as to violate his rights under the due process clause of the 14th Amendment of the United States Constitution.

6. Section 1436 of the General City Code of Birmingham of 1944 under which defendant, a Negro, was arrested and charged with violation of trespass upon land after being forbidden to enter is on the evidence unconstitutional as applied to defendant in that it makes it a crime to be on property open to the public after being asked to leave, because of race or color, in violation of defendant's rights under the due process and equal protection clauses of the 14th Amendment of the United States Constitution.

[fol. 7] 7. The evidence against defendant, a Negro, establishes that he, at the time of arrest and all times covered by the complaint, was a member of the public, peaceably attempting to use a publicly owned facility, to-wit: Woolworth's Eating Facilities and from which defendant was barred because of his race or color; that such denial was in accordance with a policy, custom and usage of Woolworth's Eating Facilities, of operating such facilities and services on a racially segregated basis, which policy, custom and usage violates the due process and equal protection clauses of the 14th Amendment of the Constitution of the United States.

8. The evidence offered against the defendant, a Negro, establishes that at the time of arrest and all times covered by the complaint he was a member of the public, attempt-

ing to use a facility, Woolworth's Eating Facilities, open to the public, which was denied to him solely because of race or color; that Woolworth's eating facilities, was and is offering, for a price, to serve all members of the public with food; that this public facility, Woolworth's Eating Facilities is, along with others of a similar nature, performing a necessary service for the public, which in fact, would have to be provided by the state if Woolworth's Eating Facilities and other like facilities were all to withdraw said service; that having determined to offer said valuable service to the public, Woolworth's Eating Facilities is required to provide such service in the manner of state operated facilities of a like nature, to-wit: That Woolworth's Eating Facilities may not segregate or exclude defendant on the ground of race or color, in violation of the due process and equal protection clauses of the 14th Amendment of the United States Constitution.

Arthur D. Shores, Orzell Billingsley, Jr., J. Richmond Pearson, Attorneys for Defendant.

[File endorsement omitted]

[fol. 8]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

Appealed from Recorder's Court

(Trespass After Warning)

Honorable Geo. Lewis Bailes, Judge Presiding

CITY OF BIRMINGHAM,

vs.

JESSIE WALKER.

JUDGMENT ENTRY—October 10, 1960

T the 10th day of October, 1960, came Wm. C. Walker, who prosecutes for the City of Birmingham, and also came

the defendant in his own proper person and by attorney, and the City of Birmingham files written Complaint in this cause, and the defendant being duly arraigned upon said Complaint for his plea thereto says that he is not guilty; and defendant files motion to strike, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion the defendant hereby duly and legally excepts; and the defendant files demurrers, and said demurrers being considered by the Court, it is ordered and adjudged by the Court that said demurrers be and the same are hereby overruled, to which action of the Court in overruling said demurrers the defendant hereby duly and legally excepts; and the defendant files motion to exclude the evidence, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion, the defendant hereby duly and legally excepts; and on this the 11th day of October, 1960, the Court finds the defendant guilty as charged in the Complaint and thereupon assessed a fine of One Hundred ($100.00) dollars and costs against said defendant. It is therefore considered by the Court, and it is the judgment of the Court that said defendant is guilty as charged in said Complaint, and that he pay a fine of One Hundred ($100.00) dollars and costs of this cause.

And said defendant being now in open Court, and having presently failed to pay the fine of $100.00 and the costs of $5.00 accrued in the Recorder's Court of the City of Birmingham, or to confess judgment with good and sufficient security for the same, it is therefore considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said Jessie Walker, perform hard labor for the City of Birmingham for fifty-two days, because of his failure to pay said fine and costs of $5.00 accrued in said Recorder's Court, or to confess judgment with good and sufficient security therefor.

It is further considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the [fol. 9] Law, that the defendant, the said Jessie Walker, perform additional hard labor for the City of Birmingham for thirty days, as additional punishment in this cause.

And the costs legally taxable against the defendant in this cause amounting to fifty and 85/100 ($50.85) dollars, not being presently paid or secured, and $4.00 of said amount being State Trial Tax, $3.00, and Law Library Tax, $1.00, leaving forty-six and 85/100 ($46.85) dollars taxable for sentence, it is ordered by the Court that said defendant perform additional hard labor for the County for sixty-three days, at the rate of 75¢ per day to pay said costs. It is further ordered by the Court that after the sentence for the City of Birmingham, has expired, that the City authorities return the defendant to the County authorities to execute said sentence for costs.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in this behalf expended for feeding the defendant while in jail, for which let execution issue.

And on this the 11th day of October, 1960, the defendant files motion for a new trial in this cause, and said motion coming on to be heard and determined by the Court, it is ordered by the Court, and it is the judgment of the Court that said motion be and the same is hereby overruled.

And notice of appeal being given, and it appearing to the Court that, upon the trial of this cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Appeals of Alabama, it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at $300.00, conditioned as required by Law.

[fol. 10]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
OF ALABAMA

No. 20790

CITY OF BIRMINGHAM, a Municipal Corporation, Plaintiff,

vs.

JESSIE WALKER, Defendant.

MOTION FOR A NEW TRIAL—Filed October 11, 1960

Now comes the defendant, in the above styled cause and with leave of the Court, first had and obtained, and moves this Honorable Court to set aside the verdict and judgment rendered on to-wit, the 11th day of October, 1960, and that this Honorable Court will grant the defendant a new trial, and as grounds for said motion sets out and assigns the following, separately and severally:

1. That the judgment of the Court in said case is contrary to the law.

2. For that the judgment of the Court is contrary to the facts.

3. For that the judgment of the Court is contrary to the law in the case.

4. In that the judgment of the Court is not sustained by the great preponderance of the evidence in the case.

5. For that the judgment of the Court is not sustained by the great preponderance of the evidence in the case.

6. For that the judgment of the Court is so unfair, as to constitute a gross miscarriage of justice.

7. For that the sentence is excessive.

8. For that the Court erred in overruling objections, by the defendant to the introduction of evidence offered on behalf of the City of Birmingham, Alabama, in this case.

9. For the Court erred in overruling objections by the defendant to the introduction of evidence which was so biased and prejudiced that the defendant was denied the right of a fair and impartial trial.

10. The Court erred in overruling defendant's demurrers filed in this cause.

11. The Court erred in overruling the defendant's Motion to Strike the Complaint in this cause.

12. The Court erred in finding the defendant guilty of violating the laws or ordinances of the City of Birmingham, [fol. 11] Alabama, in that the laws or ordinances, under which this defendant was charged and convicted, and as applied to this defendant, constituted an abridgement of freedom of speech violative of rights and liberties secured to the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

13. That the Court erred in refusing to find that the ordinance under which this defendant was being tried, as applied to this defendant, constituted a denial of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

14. That the Court erred in finding the defendant guilty of violating the laws or ordinances of the City of Birmingham, Alabama, in that the laws or ordinances under which this defendant was charged and convicted, and as applied to this defendant, constituted a deprivation of liberty without due process of law, in violation of the Constitution of the State of Alabama, and the provisions of the Fourteenth Amendment to the United States Constitution.

15. The Court erred in overruling defendant's Motion to exclude the evidence in this cause.

16. That it appeared from the evidence that no owner of the premises involved had caused the arrest and prosecution of the defendant, but that such arrest was procured by the officials of the City of Birmingham, Alabama, without first having a complaint from such owner, or other person in charge of such premises.

17. For that it appears from the evidence that the defendant was not prosecuted by the owner of private property, as provided for by the pertinent laws or ordinances of the City of Birmingham, but by police officials.

18. For that it appears from the evidence affirmatively that no owner or other person in charge of the premises involved, or otherwise, having authority to do so, procured the arrest of the defendant or signed a complaint or swore out a warrant against the defendant for trespass on private property.

19. For that it affirmatively appears that the defendant was not requested to leave the premises of the store involved, but was only told to go elsewhere in said store.

Oscar W. Adams, Jr., Arthur D. Shores, Orzell Billingsley, Jr., J. Richmond Pearson, Peter A. Hall, Attorneys for Defendant.

[fol. 12]

ORDER OVERRULING

The foregoing Motion being presented in open court, this the 11th day of October, 1960; the same being considered and understood, the Court is of the opinion that the same should be overruled.

It is therefore, Ordered, Adjudged and Decreed that the said Motion is hereby overruled.

Geo. Lewis Bailes, Circuit Judge.

[File endorsement omitted]

Appeal Bond to the Court of Appeals of Alabama (omitted in printing).

[fol. 14]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

IN AND FOR JEFFERSON COUNTY

No. 20790

THE CITY OF BIRMINGHAM, a Municipal Corporation,

versus

JESSE WALKER.

Birmingham, Alabama

Transcript of Evidence—October 10, 1960

BEFORE: Honorable George L. Bailes, Judge.

APPEARANCES:

For the City, Mr. Watts E. Davis.

For the Defendant, Messrs. A. D. Shores, Orzell Billingsley, Jr., Peter A. Hall, Oscar W. Adams, Jr., J. Richmond Pearson.

[fol. 16] *Proceedings*

Mr. Davis: If Your Honor pleases, these are two cases that took place at Woolworth's on the same date we had in the Davis and Gober cases.

Mr. Shores: Your Honor, we propose to file demurrers and motions to strike in these two cases and I guess the ruling will be the same and you will give us an exception.

Mr. Davis: If Your Honor pleases, that is agreeable with counsel.

Mr. Adams: Just a minute, Mr. Davis.

(Counsels confer)

Mr. Davis: Mr. Casey will you take the stand.

RICHARD C. CASEY, called as a witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Davis:

Q. Will you please state your full name?
A. Richard C. Casey.
Q. Mr. Casey, are you employed as a police officer with the City of Birmingham?
A. Yes, sir, I am.
Q. Were you so employed on March 31, 1960?
A. Yes, sir.
Q. On the morning of March 31, 1960 at or about 10:45 a.m., did you have occasion to go to the Woolworth's store?
A. Yes, sir, I did.
Q. Is that in the City of Birmingham?
A. Yes, sir.
Q. What part of the store did you go to?
A. I went to the lunch counter on the first floor.
Q. Did you observe anything unusual or out of the ordinary on that occasion?
A. Yes, sir.
[fol. 17] Q. Tell the Court what you observed.
A. The lights were turned out over the lunch counter and there were two Negro males seated at the counter. Mrs. Evans was there waiting for the officer.
Q. Have you since learned who these two colored boys were?
A. Yes, sir.
Q. Was one of them Jesse Walker and the other Willie Willis?
A. Yes, sir.
Q. Do you see them in the Court here today?
A. Yes, sir.
Q. Can you point them out?
A. Walker and Willis, Walker to my right and Willis to my left.
Q. The two boys seated between counsel at the counsel table?
A. Yes, sir.

Q. Did you have any conversation with the boys yourself?

A. No, sir, not at that time.

Q. Was anybody else or did anybody else have any conversation with them in your presence?

A. Yes, sir.

Q. Who was that?

A. Mrs. Evans.

Q. What conversation did you hear between her and these two defendants?

A. She told the defendants that the lunch room was closed and they would have to leave.

Q. Did they leave?

A. After we placed them under arrest, yes, sir.

Mr. Davis: That is all.

Cross examination.

By Mr. Shores:

Q. Officer Evans, how did you happen to go to Woolworth's?

A. The name is Casey.

Q. Officer Casey.

[fol. 18] A. I received the call over the radio.

Q. You received the call over the radio?

A. Yes, sir.

Q. You were in a radio patrol car?

A. I was in the motor, 3-wheeled motor.

Q. From whom did you receive the call?

A. Dispatcher for the City of Birmingham Police Department.

Q. You were instructed to go to Woolworth's?

A. That is right.

Q. Whom did you first contact after you arrived at Woolworth's?

A. Mrs. Evans. We went immediately to the lunch counter where we contacted Mrs. Evans.

Q. Was there a conversation between you and Mrs. Evans?

A. No other than the fact that she did state that she

had told the boys to leave, that the place was closed, and the second time she directed her conversation to the defendants and told them it was closed and they would have to leave, she would not serve them.

Q. Was there anyone else seated at the lunch counter?

A. There was no one else there at all.

Q. Did Mrs. Evans instruct you to place the defendants under arrest?

A. No.

Q. Did anyone ever make a complaint to you from the store?

A. Other than Mrs. Evans, no.

Q. And she didn't instruct you to arrest the boys.

A. No.

Q. Did anybody instruct you to arrest them?

A. At the time?

Q. At the time.

A. No.

Q. In other words, did you take it upon yourself to make these arrests?

A. I did under authority of the City of Birmingham.

Q. What charge did you place? You say you did arrest [fol. 19] them under the authority of the City of Birmingham?

A. That is right.

Q. But not under any instructions from the store?

A. I took the complaint from Mrs. Evans that she wanted the boys out of the store, that the lunchroom was closed.

Q. In other words she stated to you that she wanted the boys out of the store?

A. She told them that they would have to leave, yes.

Q. Did she say the store?

A. The lunch counter.

Q. She didn't order them out of the store?

A. No, she said they would have to leave the lunch counter, it was closed.

Q. Do you know who Mrs. Evans is?

A. She is Manager or was Manager of the lunch counter.

Q. Do you know whether she is still employed there?

A. That I don't.

Q. What charge did you place against them when you arrested them?

A. Trespassing after warning.

Q. Did you notify them at the time that that was the charge being placed against them?

A. I did, and later on a second time at the time we placed them in the car.

Q. Did anybody from Woolworth's ever make any complaint that these boys were trespassing?

A. I couldn't say. I don't know.

Q. In other words you were not instructed by the store or anybody connected with the store to make an arrest?

Mr. Davis: If the Court pleases, we have been over this several times. I don't know whether the answer is satisfactory or not but it is repetition.

The Court: Let him answer.

A. As directly asking us to place them under arrest, no. [fol. 20] We told them they would have to come to headquarters or be contacted to sign a warrant.

Q. Did they ever sign a warrant?

A. I couldn't say that. I don't know.

Mr. Shores: That is all.

Mr. Davis: That is all. The City rests, Your Honor.

Mr. Adams: I would like to file a motion to exclude the evidence in the case of Jesse Walker and I would like to make and place a written motion in the place of oral motion and include the same grounds as in Jesse Walker's case, to exclude the evidence against Willie Willis also, and the grounds specified are the same grounds specified in the motions in the other two cases, that there is no evidence that there was any disorderly conduct involved in the defendants sitting in the eating facilities at Woolworth's. The Statute as specified is unconstitutional both by State Statutes as well as Federal Statutes in that it doesn't specify that the owner of the place or someone in charge of the place would make the warning, meaning that anybody could make the warning and the defendants would be in violation of the Statute. And it violates the defendants' constitutional right to assemble and peacefully

demonstrate for what they believe are their rights, and on the basis of the Statute and its application to the defendants I think the evidence would not justify a conviction.

The Court: Overruled.

Mr. Adams: We except.

Mr. Shores: All right, Jesse, take the stand.

JESSE H. WALKER, called as a witness, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Shores:

Q. State you name?

A. Jesse H. Walker.

[fol. 21] Q. Jesse, on this occasion of March 31, did you go to Woolworth's store?

A. I did.

Q. For what purpose did you go?

A. I went to make a purchase of handkerchiefs and birthday gift for a friend of mine and a birthday card and while there—

Mr. Davis: We object if that is the end of the purpose.

Q. While you were there did anybody accompany you?

A. I did meet a fellow in the store bu I went to the store alone.

Q. Who did you meet in the store?

A. Willie Willis.

Q. Did Willis make a purchase?

A. He did.

Q. Where did you go after you made th purchase?

A. To the lunch counter.

Q. Did Willis accompany you to the lunch counter?

A. He did.

Q. You are a Negro, aren't you?

A. I am.

Q. Did you make any order while you were at the lunch counter, did you order anything?

A. We didn't get a chance to.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 31 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 66

JAMES GOBER, JAMES ALBERT DAVIS, ROY HUTCHINSON, ROBERT J. KING, ROBERT PARKER, WILLIAM WEST, ROBERT D. SANDERS, ROOSEVELT WESTMORELAND, JESSIE WALKER, WILLIE J. WILLIS,

Petitioners,

—v.—

CITY OF BIRMINGHAM

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

JACK GREENBERG
CONSTANCE BAKER MOTLEY
10 Columbus Circle
New York City, New York
ARTHUR D. SHORES
PETER A. HALL
ORZELL BILLINGSLEY, JR.
OSCAR W. ADAMS, JR.
J. RICHMOND PEARSON

Attorneys for Petitioners

LEROY D. CLARK
MICHAEL MELTSNER
JAMES M. NABRIT, III

of Counsel

TABLE OF CONTENTS

	PAGE
Citations to Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement	4
Gober and Davis	5
Hutchinson and King	8
Parker and West	9
Sanders and Westmoreland	10
Walker and Willis	12
Facts in Common	12
How the Federal Questions Were Raised and Decided Below	14
Reasons for Granting the Writ	18
I. Petitioners were denied due process of law and equal protection of the laws by conviction of trespass for refusing to leave white dining areas where their exclusion was required by City ordinance	18
II. Petitioners were denied due process and equal protection by convictions for trespass for refusal to leave whites-only dining areas of department stores in which all persons are otherwise served without discrimination	23

PAGE

III. The convictions deny due process of law in that they rest on an ordinance which fails to specify that petitioners should have obeyed commands to depart given by persons who did not establish authority to issue such orders at the time given 27

IV. The decision below conflicts with decisions of this Court securing the right of freedom of expression under the Fourteenth Amendment to the Constitution of the United States 30

Conclusion 34

APPENDIX:

Judgment Entry in Gober Case 1a

Opinion in the Alabama Court of Appeals (in Gober Case) 4a

Order of Affirmance in Gober Case 13a

Order Denying Application for Rehearing in Gober Case 14a

Order Denying Petition for Writ of Certiorari to the Court of Appeals in Gober Case 15a

Order Denying Rehearing in Gober Case 16a

Judgment Entry in Roosevelt Westmoreland Case 17a

Order of Affirmance in Roosevelt Westmoreland Case 20a

Order Denying Rehearing in Roosevelt Westmoreland Case 21a

PAGE

Order Denying Petition for Writ of Certiorari in Roosevelt Westmoreland Case 22a

Order Denying Rehearing in Roosevelt Westmoreland Case 23a

Table of Cases

Abie State Bank v. Bryan, 282 U.S. 765 8
Abrams v. United States, 250 U.S. 616 30
Adams v. Saenger, 303 U.S. 59 8

Baldwin v. Morgan, 287 F. 2d 750 (5th Cir. 1961) 22
Boman v. Birmingham Transit Company, 280 F. 2d 531 (5th Cir. 1960) 22
Breard v. Alexandria, 341 U.S. 622 31
Browder v. Gayle, 352 U.S. 903 (1956) 25
Brown v. Board of Education, 347 U.S. 483 22
Buchanan v. Warley, 245 U.S. 60 ..... 22, 24
Burton v. Wilmington Parking Authority, 365 U.S. 715 ..... 22, 23, 26

Central Iron Co. v. Wright, 20 Ala. App. 82, 101 So. 815 29
Connally v. General Construction Co., 269 U.S. 385 28
Cooper v. Aaron, 358 U.S. 1 33

Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala. 1949) aff'd 336 U.S. 933 21

Frank v. Maryland, 359 U.S. 360 27
Freeman v. Retail Clerks Union, Washington Superior Court, 45 Lab. Rel. Ref. Man. 2334 (1959) 33

PAGE

Garner v. Louisiana, 7 L. ed. 2d 207 ..... 5, 24, 29, 30, 31
Gayle v. Browder, 352 U.S. 903, aff'g 142 F. Supp. 707 (M.D. Ala. 1956) 22
Guinn v. United States, 238 U.S. 347 21

Holmes v. City of Atlanta, 350 U.S. 879 22
Hudson County Water Co. v. McCarter, 209 U.S. 349 27

Junction R.R. Co. v. Ashland Bank, 12 Wall. (U. S.) 226 8

Lambert v. California, 355 U.S. 225 28
Lane v. Wilson, 307 U.S. 268 21
Lanzetta v. New Jersey, 306 U.S. 451 28
Louisiana State University and A. & M. College v. Ludley, 252 F. 2d 372 (5th Cir. 1958), cert. denied 358 U.S. 819 21

Mapp v. Ohio, 367 U.S. 643 26
Marsh v. Alabama, 326 U.S. 501 ..... 24, 32
Martin v. Struthers, 319 U.S. 141 31
Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877 22
McCord v. State, 79 Ala. 269 29
Monk v. Birmingham, 87 F. Supp. 538 (N.D. Ala. 1949) aff'd 185 F. 2d 859, cert. denied 341 U.S. 940 7
Morissette v. United States, 342 U.S. 246 29

N.A.A.C.P. v. Alabama, 357 U.S. 449 30
N.L.R.B. v. American Pearl Button Co., 149 F. 2d 258 (8th Cir. 1945) 32
N.L.R.B. v. Fansteel Metal Corp., 306 U.S. 240 32

Owings v. Hull, 9 Peters (U. S.) 607 8

People v. Barisi, 193 Misc. 934, 86 N.Y.S. 2d 277 (1948) 32
Poe v. Ullman, 367 U.S. 497 27

PAGE

Railway Mail Ass'n v. Corsi, 326 U.S. 88 26
Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793 32

San Diego Bldg. Trades Council v. Garmon, 349 U.S. 236 32
Schenck v. United States, 249 U.S. 47 33
Sellers v. Johnson, 163 F. 2d 877 (8th Cir. 1947), cert. denied 332 U.S. 851 33
Shell Oil v. Edwards, 263 Ala. 4, 88 So. 2d 689 (1955) 7
Shelley v. Kraemer, 334 U.S. 1 24
Smiley v. City of Birmingham, 255 Ala. 604, 52 So. 2d 710 (1961) 7
Smith v. California, 361 U.S. 147 34
State Athletic Commission v. Dorsey, 359 U.S. 533 22
State of Maryland v. Williams, Baltimore City Court, 44 Lab. Rel. Ref. Man. 2357 (1959) 33
Stromberg v. California, 283 U.S. 359 30

Terminiello v. Chicago, 337 U.S. 1 33
Thompson v. City of Louisville, 326 U.S. 199 29
Thornhill v. Alabama, 310 U.S. 88 ..... 30, 32

United States v. Willow River Power Co., 324 U.S. 499 24
United Steelworkers v. N.L.R.B., 243 F.2d 593 (D.C. Cir. 1956), reversed on other grounds, 357 U.S. 357 32

West Virginia State Board of Education v. Barnette, 319 U.S. 624 30
Wieman v. Updegraff, 344 U.S. 183 34
Williams v. Hot Shoppes, Inc., 293 F. 2d 835 (D.C. Cir. 1961) 25
Williams v. Howard Johnson's Restaurant, 268 F. 2d 845 (4th Cir. 1959) 22

Statutes

	PAGE
United States Code, Title 28, §1257(3)	2
Alabama Constitution, §102	25
Alabama Constitution, §111, amending §256	25
Code of Alabama, Title 1, §2	25
Code of Alabama, Title 7, §429(1) (1940)	7
Code of Alabama, Title 14, §§360-361	25
Code of Alabama, Title 14, §426	29
Code of Alabama, Title 44, §10	25
Code of Alabama, Title 45, §4	25
Code of Alabama, Title 45, §§121-123, 52, 183	25
Code of Alabama, Title 45, §248	25
Code of Alabama, Title 46, §189(19)	25
Code of Alabama, Title 48, §§186, 196-197, 464	25
Code of Alabama, Title 48, §301 (31a, b, c)	25
Code of Alabama, Title 51, §244	25
Code of Alabama, Title 52, §24	25
Code of Alabama, Title 52, §§452-455	25
Code of Alabama, Title 52, §455(1)-(4)	25
General City Code of Birmingham, §369 (1944)	3, 7, 15
General City Code of Birmingham, §1436 (1944)	3, 5, 14

Other Authorities

	PAGE
American Law Institute, Model Penal Code, Tentative Draft No. 2, §206.53, Comment	29
Sayre, Public Welfare Offenses, 33 Columbia L. Rev. 55 (1933)	29

IN THE

Supreme Court of the United States

October Term, 1961

No. .....

JAMES GOBER, JAMES ALBERT DAVIS, ROY HUTCHINSON, ROBERT J. KING, ROBERT PARKER, WILLIAM WEST, ROBERT D. SANDERS, ROOSEVELT WESTMORELAND, JESSIE WALKER, WILLIE J. WILLIS,

Petitioners,

—v.—

CITY OF BIRMINGHAM

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

Petitioners pray that writ of certiorari issue to review the judgments of the Alabama Court of Appeals entered in the above entitled cases as set forth in "Jurisdiction," *infra.*

Citation to Opinion Below*

The opinion of the Alabama Court of Appeals is not reported, and is set forth in the Appendix hereto *infra* p. 4a. The denial of certiorari by the Supreme Court of Alabama is unreported and appears in the Appendix; *infra,* p. 22a.

*The Appendix contains the following opinions and orders in *Gober*: Judgment; Opinion of Alabama Court of Appeals; Judgment, Alabama Court of Appeals; Denial of Rehearing, Alabama Court of Appeals; Denial of Certiorari, Supreme Court of Alabama; Denial of Rehearing on Petition for Writ of Certiorari, Supreme Court of Alabama. All other cases were affirmed on authority of *Gober*. Pertinent orders and opinions are set forth for the *Westmoreland* case; all the orders and opinions in the other cases are identical and, therefore, are omitted.

Jurisdiction

The judgments of the Alabama Court of Appeals were entered on May 30, 1961 (Gober 57, Davis 60, Hutchinson 42, King 42, Parker 45, West 41, Sanders 36, Westmoreland 33, Walker 36, Willis 33); Appendix p. 13a *infra*. Petitions to the Supreme Court of Alabama for Writs of Certiorari were denied on September 14, 1961 (Gober 72, Davis 67, Hutchinson 47, King 48, Parker 46, West 50, Sanders 42, Westmoreland 38, Walker 43, Willis 39), *infra*, p. 15a.

Applications to the Supreme Court of Alabama for rehearing were overruled on November 2, 1961 (Gober 74, Davis 69, Hutchinson 49, King 50, Parker 48, West 52, Sanders 44, Westmoreland 40, Walker 45, Willis 41), *infra*, p. 16a.

The jurisdiction of this Court is invoked pursuant to United States Code 28, Section 1257(3), petitioners having asserted below, and asserting here, the deprivation of their rights, privileges, and immunities secured by the Constitution of the United States.

Questions Presented

Whether Negro petitioners were denied due process of law and equal protection of the laws secured by the Fourteenth Amendment:

1. When arrested and convicted of trespass for refusing to leave department stores' dining areas where their exclusion was required by an Ordinance of the City of Birmingham which orders segregation in eating facilities.

2. By conviction of trespass for refusal to leave whites-only dining areas of department stores in which all persons are otherwise served without discrimination.

3. When arrested and convicted of trespass for seeking nonsegregated food service at whites-only dining areas upon records barren of evidence that any person making the requests to leave identified his authority to make the request.

4. Whether petitioner sit-in demonstrators were denied freedom of expression secured by the Fourteenth Amendment when arrested and convicted for trespass upon refusal to move from whites-only dining areas where the managers did not call the police or sign any affidavit or warrant demanding prosecution and were apparently willing to endure the controversy without recourse to criminal process.

Constitutional and Statutory Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves the following sections of the City Code of Birmingham, Alabama:

> "Section 1436 (1944), *After Warning.* Any person who enters into the dwelling house, or goes or remains on the premises of another, after being warned not to do so, shall on conviction, be punished as provided in Section 4, provided, that this Section shall not apply to police officers in the discharge of official duties.
>
> Section 369 (1944), *Separation of races.* It shall be unlawful to conduct a restaurant or other place for the serving of food in the city, at which white and colored people are served in the same room, unless such white and colored persons are effectually separated by a solid partition extending from the floor

upward to a distance of seven feet or higher, and unless a separate entrance from the street is provided for each compartment" (1930, Section 5288).

Statement

These are ten sit-in protest cases tried in five separate trials.[1] The protests—involving common facts relevant to the Constitutional issues here presented—occurred the same day in five department stores in each of which two petitioners were arrested and charged with commission of the same acts; all were sentenced identically in a common sentencing proceeding (Gober 52-56, Davis 51-55; Hutchinson 34-38, King 34-38; Parker 36-40, West 33-37; Sanders 28-32, Westmoreland 25-29; Walker 28-32, Willis 25-29)[2] after trials held *seriatim* with the same judge, prosecution, and defense counsel. Identical constitutional and state law questions were raised in each case. See *infra*, pp. 14-18. The Alabama Court of Appeals wrote an affirming opinion for the first case, *Gober* v. *State of Alabama*, see *infra*, p. 4a, affirming all others in brief *per curiam* orders merely citing *Gober*, see *infra*, p. 20a. The Supreme Court of Alabama denied certiorari in all cases in identical orders.[3]

---

[1] While there are ten separate records there is a single transcript of testimony for each pair of defendants arrested in a single establishment (or five transcripts in all) of which a carbon copy appears in the record of each one of the pair.

[2] The sentencing portion of each of the ten records is identical. Record citations are indicated by the name of the defendant and the page.

[3] A sixth pair of cases, *Billups* v. *State of Alabama* and *Shuttlesworth* v. *State of Alabama*, arose in connection with the same situation, but presents somewhat different issues in that Billups and Shuttlesworth were convicted of having persuaded the petitioners bringing this petition to engage in the sit-in protests which are the subject of this petition. These two men were sentenced in the same proceeding as the instant petitioners. A separate petition for certiorari is being filed concerning Billups and Shuttlesworth.

See *infra*, pp. 15a, 22a. Hence, for convenient presentation, although each pair of cases differs somewhat, the issues are brought here by petition for writ of certiorari in a single document. Cf. *Garner* v. *Louisiana*, 7 L. ed. 2d 207, 211.

Petitioners were convicted in the Recorder's Court of the City of Birmingham for having trespassed after warning in violation of City Code of Birmingham, Alabama, §1436 (1944):

> "Sec. 1436, *After Warning.* Any person who enters into the dwelling house, or goes or remains on the premises of another, after being warned not to do so, shall on conviction, be punished as provided in Section 4, provided, that this Section shall not apply to police officers in the discharge of official duties."

Upon conviction they received trials *de novo* in the Circuit Court of Jefferson County, were again adjudged guilty, and sentenced to thirty days hard labor and $100.00 fine. (Gober 8, Davis 8-9; King 8-9, Hutchinson 8-9; Parker 8-9, West 5-6; Sanders 8-9, Westmoreland 5-6; Walker 8-9, Willis 5-6.)

Each complaint charged that petitioner " . . . did go or remain on the premises of another, said premises being the area used for eating, drinking and dining purposes and located within the building commonly and customarily known as [the store in question] after being warned not to do so, contrary to and in violation of Section 1436 of the General City Code of Birmingham of 1944." (Gober 2, Davis 2; King 2, Hutchinson 2; Parker 2, West 2; Sanders 2, Westmoreland 2; Walker 2, Willis 2.)

Gober and Davis

The *Gober* and *Davis* cases arose from a sit-in protest at Pizitz's Department Store, Birmingham. Davis, on

March 31, purchased socks, toothpaste and handkerchiefs at Pizitz's, and with Gober attempted to order at the lunch counter, but the waitress refused to approach (Gober 42, Davis 43). Without identifying himself a man informed them that Negroes could be served elsewhere in the store, but did not ask them to leave the store or where they were sitting (Gober 19-22, Davis 20-23). No sign indicated a segregation policy or that the counter was solely for whites (Gober 50, Davis 50).

That morning, Police Officer Martin testified, a superior had reported (Gober 17, Davis 18) a disturbance at Pizitz's to him; he went to the dining area, found it closed to customers, and saw two Negro males seated conversing together. No one spoke to them in Martin's hearing, neither did he speak to any person in the store (Gober 15-17, Davis 16-18). He arrested them (Gober 17-18, Davis 17-19).

The store's controller, Gottlinger (Gober 19, Davis 20), saw two Negro boys seated in the lunch area, said nothing to them, but heard one say "we should call the police" (Gober 19, Davis 20).

This witness observed an assistant to the store president speak to the boys, asking that they leave the tea room, informing them they could be served in the basement Negro restaurant because "it would be against the law to serve them there" in the tea room area (Gober 22, Davis 23).

Here, in the first case tried, petitioners tried to interrogate concerning the segregation ordinance of the City of Birmingham (Gober 22-24; Davis 23-25):

> "Mr. Hall: . . . It is our theory of this case it is one based simply on the City's segregation ordinance and Mr. Gottlinger, Mr. Pizitz, the police officers and everybody involved acted simply because of the segregation law and not because it was Pizitz policy. . . .
>
> * * * * *

"Mr. Hall: As I understand it it is the theory of the City's case, it is trespass after warning. Our contention is that that is not a fact at all, it is simply an attempt to enforce the segregation ordinance and we are attempting to bring it out.

"The Court: Does the complaint cite some statute?

"Mr. Hall: Trespass after warning: If we went only on the complaint it would seem that some private property has been abused by these defendants and that the owner of this property has instituted this prosecution. From the witness' answers it doesn't seem to be the case. It seems it is predicated on the segregation ordinance of the City of Birmingham rather than on the trespass. So what we are trying to bring out is whether or not the acts of Pizitz were based on the segregation ordinance or something that has to do with trespass on the property."

(And see Parker 25-28, West 22-25.)

The Birmingham Segregation Ordinance to which counsel referred is General City Code of Birmingham §369 (1944),[4] requiring that Negroes and whites be separated

---

[4] "Sec. 369. Separation of races.

It shall be unlawful to conduct a restaurant or other place for the serving of food in the city, at which white and colored people are served in the same room, unless such white and colored persons are effectually separated by a solid partition extending from the floor upward to a distance of seven feet or higher, and unless a separate entrance from the street is provided for each compartment" (1930, §5288).

This ordinance is judicially noticeable by the Alabama courts, 7 Code of Alabama, 1940, §429(1). See *Shell Oil* v. *Edwards*, 263 Ala. 4, 9, 88 So. 2d 689 (1955); *Smiley* v. *City of Birmingham*, 255 Ala. 604, 605, 52 So. 2d 710 (1951). "The act approved June 18, 1943, requires that all courts of the State take judicial knowledge of the ordinances of the City of Birmingham." *Monk* v. *Birmingham*, 87 F. Supp. 538 (N. D. Ala. 1949), aff'd 185 F. 2d 859, cert. denied 341 U. S. 940. And this Court takes judicial notice

in restaurants by solid partition and that they have separate entrances. The evidence was excluded (Gober 24, Davis 25).

Gottlinger did not call the police (Gober 24, Davis 25); when asked by the police whether he witnessed the episode, petitioners already had been arrested and were being escorted out of the store by the police (Gober 24, 25; Davis 25, 26). It does not appear that any store official summoned the police or made a complaint (Gober 24, 25; Davis 25, 26).

Hutchinson and King

Police Officer Martin proceeded to Loveman's Department Store, Birmingham, along with Officer Holt who told him to accompany him on his motorcycle (Hutchinson 17, King 17). At the dining area entrance Martin found a rope tied from one post to another; a sign stated the area was closed. (*Ibid.*) He saw two Negro boys at a table but had no conversation " . . . other than to tell them that they were under arrest". (*Ibid.*)

He did not know of his own knowledge that anyone from Loveman's had asked them to leave (Hutchinson 18, King 18). Apparently at the same time Police Lt. Purvis approached Mr. Schmid, the dining area concessionnaire, stating that " . . . someone called us that you had two people in here that were trying to be served . . . " Schmid pointed to petitioners (Hutchinson 22, King 22).

The Protective Department had been notified because, as Mr. Schmid testified, "naturally", in this case, there was a "disturbance of the peace" (Hutchinson 22, King 22). The only disturbance, however, was that " . . . the waiters

---

of laws which the highest court of a state may notice. *Junction R.R. Co.* v. *Ashland Bank*, 12 Wall. (U. S.) 226, 230; *Abie State Bank* v. *Bryan*, 282 U. S. 765, 777, 778; *Adams* v. *Saenger*, 303 U. S. 59; *Owings* v. *Hull*, 9 Peters (U. S.) 607, 625.

left the floor." (*Ibid.*) Petitioners were not boisterous or disorderly (Hutchinson 28, King 28).

Mr. Kidd of the Protective Department who apparently was in charge of the situation at no time spoke to petitioners (Hutchinson 25, King 25). He merely asked the *white* persons there to leave. (*Ibid.*) Neither did he call the police, but was notifying patrons that the restaurant was closed when they arrived. So far as he knew no one called the police (Hutchinson 26, 29, King 26, 29).

Loveman's invites the general public to trade and sells general merchandise (Hutchinson 31, King 31). Its eating facilities, however, are for whites only (Hutchinson 24, King 24).

Parker and West

Police Officer Myers received a radio call from headquarters to proceed to Newberry's, Birmingham; visited the eating area and found "Two colored males [petitioners West and Parker] were sitting at the lunch counter", which was "out of the ordinary" (Parker 16-17, West 13-14). He did not speak with them nor did they converse with any store employee in his presence (Parker 17, West 14), but he arrested them for trespass after warning, it having been his "understanding" that his partner had received a complaint from a Mr. Stallings, whose capacity at the store the witness did not know, nor did the witness know whether he was employed there (Parker 18-19, West 15-16).

West had met Parker at the store where West had purchased some paper and small comic books (Parker 29, West 26). When they seated themselves some white people were eating, but petitioners were not served (Parker 30, West 27). No sign at the counter indicated service for

whites only. (*Ibid.*) (At a Negro counter elsewhere in the store a sign stated "for colored only". (Parker 24, West 21).) The officers, upon arrival, ordered the white people to get up, but all did not leave (Parker 31, West 28).

Mrs. Gibbs, the store detective, told petitioners they could be served at a Negro snack bar on the fourth floor but not where they were seated (Parker 21, West 18). (Nor could they be served at another lunch counter for whites only in the basement (Parker 22, West 19).)

Assistant Store Manager Stallings also asked petitioners to patronize the Negroes-only counter. Stallings, however, did not call the police, but was informed that "someone" did. He made no complaint to the police at the time of arrest, nor subsequently, and did not know whether anyone else did (Parker 23-24, West 20-21).

Newberry's advertises and sells merchandise to the general public. Negroes and whites shop together on the first floor (Parker 24-25, West 21-22).

Petitioners' counsel attempted to establish that the lunch counter segregation policy was the City of Birmingham's, not Newberry's (Parker 25-27, West 22-24). This line of inquiry was held incompetent (Parker 27, West 24).

Sanders and Westmoreland

Officer Caldwell of the Birmingham police was called to Kress's five and ten cent store, Birmingham, the same morning (Sanders 16, Westmoreland 13). Upon arrival he proceeded to the basement and observed "two black males" (*ibid.*) seated. He heard the manager inform petitioners they could not be served, the lights were turned out and the counter closed. Caldwell arrested them (Sanders 17, 18, Westmoreland 14, 15), but did not hear any request

that petitioners leave; no one in Kress's asked him to arrest them (*ibid.*).

When petitioners had seated themselves at a lunch counter bay the steward or manager, Pearson, closed it, informed them they could not be served, and turned out that bay's lights. They then requested service at a second bay. Pearson said: "Boys, you will have to leave because I can't serve you and the bay is closed. We are closing" (Sanders 19; Westmoreland 16). A woman already seated at the counter, however, remained after "closing" and so far as the steward knew, was not arrested and he was not called to bear witness against her (Sanders 26, Westmoreland 23).

One petitioner told him, "Well, we have our rights" (Sanders 19, Westmoreland 16); Pearson called the manager who approached the counter and asked Pearson whether he had asked them to leave. While the witness at this point stated that the manager asked them to leave the store (Sanders 20, Westmoreland 17), on cross-examination he explained:

> "Q. To leave that section, yes. In the store? A. The store was not mentioned" (Sanders 21; Westmoreland 18).

When Pearson and the manager left the bays, the police entered, asked petitioners to get up, additional police entered, and the first two officers escorted petitioners from the store. Neither Pearson nor the manager called the police, neither asked for the arrest, neither signed the complaint (Sanders 21-23, Westmoreland 18-20).

Kress's is a general department store advertising to the general public (Sanders 22, Westmoreland 19), but has no food service facilities for Negroes (Sanders 23, Westmoreland 20), although they are solicited to and may buy food

to carry out (Sanders 26, Westmoreland 23). Whites and Negroes, however, purchase from the same counters at all other departments (Sanders 24, Westmoreland 21).

Walker and Willis

The Birmingham Police Department radio dispatched Officer Casey to Woolworth's. There he observed something "unusual or out of the ordinary": two Negro males, petitioners Walker and Willis, at the lunch counter (Walker 16-18, Willis 13-15). Mrs. Evans, manager of the lunch counter, he testified, told petitioners to leave (Walker 19, Willis 16). Neither Mrs. Evans, nor anyone from the store, instructed him to arrest them, nor did she complain other than to say she wanted them to leave the counter—not the store (Walker 19, Willis 16). The police informed persons connected with the store that "they would have to come to headquarters or be contacted to sign a warrant" (Walker 19-20, Willis 16-17), but Officer Casey did not know whether such a warrant was signed (*ibid.*).

Walker and Willis had purchased various articles and then went to the counter (Walker 21, Willis 18). Walker denied that Mrs. Evans had spoken to them at all and testified that only the police asked him to leave (Walker 22, Willis 19). He testified also that white persons at the counter were served while he was seated. No white person, however, was arrested (Walker 22, Willis 19). No signs at the counter designated it for whites or Negroes (Walker 23, Willis 20).

Facts in Common

All the cases have salient facts in common. The protest demonstrations occurred in department stores open to the general public, including Negroes, but whose dining areas were segregated (Gober 48-49, Davis 49-50; Hutchinson 24,

31, King 24, 31; Parker 21, 24, 25, West 18, 21, 22; Sanders 22, 23, 24, 26, Westmoreland 19, 20, 21, 23; Walker 21; Willis 18). Nevertheless, apparently no racial signs were posted at any of the "white" dining areas (Gober 50, Davis 50; Hutchinson 28, King 28; Parker 27, West 30; Sanders 24, Westmoreland 21; Walker 23, Willis 30). In no case is there evidence that a person asking petitioners to leave identified himself as having authority to do so[5] (Gober 19-22; Davis 20-23; Hutchinson 18, 22, 25; King 18, 22, 25; Parker 23; West 20; Sanders 19, 20; Westmoreland 16, 17; Walker 18; Willis 15).

In each case the police immediately arrested petitioners without a request from anyone connected with the store (Gober 15-18, Davis 16-19; Hutchinson 18, 26, King 18, 26; Parker 23-24, West 20-21; Sanders 21-23, Westmoreland 18-20; Walker 19, Willis 16). In no case does it appear that anyone connected with the store called the police or subsequently signed a complaint, affidavit or warrant (Gober 25, 26, Davis 24, 25; Hutchinson 29, King 29; Parker 23-24, West 20-21; Sanders 21-23, Westmoreland 18-20; Walker 18, 19, 20, Willis 15, 16, 17). In no case were petitioners requested to leave the store itself as opposed to the counter area (Gober 23, Davis 22; Hutchinson 25, King 25; Parker 21, 22, West 18, 19; Sanders 20, 21, Westmoreland 17, 18; Walker 19, Willis 16). In each case petitioners were charged that they "did go or remain on the premises of another, said premises being the area used for eating, drinking and dining purposes . . . after being warned not to do so" (Gober 2, Davis 2; Hutchinson 2, King 2; Parker 2, West 2; Sanders 2, Westmoreland 2; Walker 2, Willis 2).

---

[5] In *Parker* and *West*, the store detective testified that he "identified" himself (Parker 18; West 21) but he nowhere testified that he identified himself as a person who had authority to ask them to leave the counter or that, in fact, he had such authority or, for that matter, as to what about himself he identified.

In each case the store management was prohibited from serving Negroes and whites in the same dining area by an Ordinance of the City of Birmingham which compelled racial segregation. See *supra* pp. 7-8, note 4, p. 7.

How the Federal Questions Were Raised and Decided Below

After conviction in the Recorders Court of the City of Birmingham petitioners appealed to the Circuit Court of the Tenth Judicial Circuit of Alabama for trials *de novo*, prior to which they filed motions to strike the complaints and demurrers, alleging that Section 1436 of the General City Code of Birmingham was unconstitutionally applied to them in that while patronizing stores open to the general public they were charged with trespass on account of race and color contrary to the equal protection and due process clauses of the Fourteenth Amendment; that Section 1436 denied due process of law secured by the Fourteenth Amendment in that it was unconstitutionally vague by not requiring that the person making the demand to depart identify his authority; that the ordinance was unconstitutionally applied in that they were engaged in sit-in demonstrations and were denied freedom of assembly and speech secured by the Fourteenth Amendment (Gober, Davis; Hutchinson, King; Parker, West; Sanders, Westmoreland; Walker, Willis, 2-4).

The motions to strike and the demurrers were overruled; exceptions were taken (Gober 7, Davis 8; Hutchinson, King 8; Parker 8, West 5; Sanders 8, Westmoreland 5; Walker 8, Willis 5).

During the trial of Gober and Davis, the first trials of the series, petitioners attempted to introduce evidence that the stores were acting in conformance to General City Code

of Birmingham §369 (1944), which requires racial segregation in establishments serving food. This line of inquiry was held incompetent (Gober 22-24, Davis 23-25).

At the close of the State's evidence, petitioners moved to exclude the evidence alleging, among other things: that the complaints were invalid because the trespasses charged were based solely on race, depriving them of due process and equal protection of the laws under the Fourteenth Amendment; that petitioners were peacefully assembled to speak and protest against the custom of racial discrimination in public establishments and were prosecuted for the purpose of denying them freedom of assembly and speech guaranteed by the Fourteenth Amendment; that the ordinance was unconstitutionally vague in not requiring that the persons requesting petitioners leave produce any evidence of authority to make the demand, whereby petitioners would be apprised of the validity of the demands to leave, thereby denying the petitioners due process of law under the Fourteenth Amendment; that all of the stores involved are vitally affected with the public interest and have assumed functions which the state would assume were they not in existence, whereby denial to petitioners of equal access to all their facilities solely because of race is a denial of due process and equal protection under the Fourteenth Amendment (Gober, Davis 5-7; Hutchinson, King 5-7; Parker 5-7, West 25 (and see Parker 5-7); Sanders 5-7; Walker 5-7, Willis 17).

The motions to exclude the evidence were overruled and exception taken (Gober, Davis 8; Hutchinson, King 8; Parker 8, West 5; Sanders 8, Westmoreland 5; Walker 8, Willis 5).

At the end of each trial petitioners moved for new trials alleging, among other things, that: the trespass ordinance was unconstitutionally applied to deprive them of free

speech, equal protection of the laws and other liberties guaranteed by the Fourteenth Amendment to the United States Constitution; that the Court erred in overruling the motions to strike the complaint, the demurrers and the motions to exclude evidence (Gober 9-11, Davis 10-12; Hutchinson, King 10-12; Parker 10, 11, West 7, 8; Sanders 10, 11, Westmoreland 7, 8; Walker 10, 11, Willis 7, 8). The motions for new trial were overruled (Gober 9, 11, Davis 9, 12; Hutchinson, King 9, 12; Parker 9, 12, West 6, 9; Sanders 9, 12, Westmoreland 6, 9; Walker 9, 12, Willis 6, 9).

Appeals were taken to the Alabama Court of Appeals and Assignments of Errors were filed against the action of the trial court in overruling the motions to strike the complaint (Assignment 1), the demurrers (Assignment 2), the motions to exclude the evidence (Assignment 3) and the motions for new trial (Assignment 4) (Gober 55, Davis 58; Hutchinson, King 41; Parker 43, West 40; Sanders 25, Westmoreland 32; Walker 35, Willis 32).

In *Gober* v. *City of Birmingham*, 6th Division 797, Ala. App. Ms. the Court of Appeals of Alabama wrote a full opinion (Gober 58) and all other cases were affirmed on the authority of Gober (Gober 58, Davis 60; Hutchinson 42, King 42; Parker 45, West 41; Sanders 36, Westmoreland 33; Walker 36, Willis 33).

While the Court held the motions to strike the complaint an improper means to raise a constitutional objection and refused to consider the demurrers, it did pass upon all of the constitutional questions raised by rejecting, adversely, on the merits, the objections to overruling the motions to exclude the evidence and the motions for new trial: "'We find no merit in appellant's Assignments numbers 3 and 4" (Gober 64).

Specifically the court held that petitioners had not been denied freedom of speech:

"Counsel has argued, among other matters, various phases of constitutional law, particularly as affected by the Fourteenth Amendment of the Federal Constitution, such as freedom of speech, in regard to which counsel stated: 'What has become known as a "sit-in" is a different, but well understood symbol, meaningful method of communication.' Counsel has also referred to cases pertaining to restrictive covenants. We consider such principles entirely inapplicable to the present case" (Gober 62).

Further, the court held the petitioners had not been denied due process and equal protection of the laws secured by the Fourteenth Amendment:

"The right to operate a restaurant on its own premises under such conditions as it saw fit to impose was an inalienable property right possessed by the Pizitz store. The appellant would destroy this property right by attempting to misapply the Fourteenth Amendment, ignoring the provision in that Amendment that grants the right to a private property owner to the full use of his property, that is: 'Nor shall any state deprive any person of life, *liberty* or *property* without due process of law' " (Gober 63).

Moreover:

"As stated in *Williams* v. *Howard Johnson Restaurant* (C.C.A. 4), 368 Fed. 2d 845, there is an 'important distinction between activities that are required by the State and those which are carried out by voluntary choice and without compulsion by the people of the State in accordance with their own desires and social practices' " (Gober 64).

Applications for rehearing before the Court of Appeals were overruled (Gober 66, Davis 61; Hutchinson, King 43; Parker 46, West 42; Sanders 37, Westmoreland 34; Walker 37, Willis 34). Writs of certiorari, sought in the Supreme Court of Alabama, were denied (Gober 72, Davis 67; Hutchinson 47, King 48; Parker 46, West 50; Sanders 42, Westmoreland 38; Walker 43, Willis 39). Applications for rehearing before the Supreme Court of Alabama were overruled (Gober 74, Davis 69; Hutchinson 49, King 50; Parker 48, West 52; Sanders 44, Westmoreland 40; Walker 45, Willis 41).

Reasons for Granting the Writ

The court below decided these cases in conflict with principles declared by this Court as is further set forth below:

I.

Petitioners were denied due process of law and equal protection of the laws by conviction of trespass for refusing to leave white dining areas where their exclusion was required by City ordinance.

Despite the fact that petitioners ostensibly were convicted for "trespass after warning" they actually were sentenced to jail and fined by Alabama for having violated the segregation policy of the City of Birmingham. This policy is expressed in the General Code of Birmingham §369 (1944) requiring all eating establishments to maintain separate facilities for Negroes and whites " . . . separated by a solid partition extending from the floor upward to a distance of seven feet or higher . . . " and requiring that separate entrances be maintained for each race. Efforts to establish by evidence that this ordinance prevented the managers of the stores from rendering the

nonsegregated service sought by petitioners was excluded at the trial in the very first of the cases tried (Gober 22-23,[6] Davis 23-24).

Moreover, corollary efforts to inquire concerning whether exclusion from the dining areas was demanded pursuant to the policy of the stores as distinct from that of the City also were rejected. Counsel for petitioners argued to the trial court:

> "The meat in this coconut is whether or not the Newberry's Department Store has complained or the City of Birmingham. It is our theory of the case it is necessary for the owner of the premises to be complaining and we are trying to find out if they have complained."

(And see the remainder of the colloquy (Parker 25-27, West 22-24).) But whether the *stores* desired not to serve was held inadmissible (*Ibid.*).

Indeed, in the *King* and *Hutchinson* cases no one connected with management had expressly asked petitioners—as distinct from white patrons—to leave the dining area. Rather, it was announced "in general terms that the tearoom was closed and for everyone please to leave" (King 20, Hutchinson 20). Yet, twenty-five "whites were still sitting there when the two Negroes were there, when the police officers came" (King 23, Hutchinson 23). But, while petitioners were arrested summarily, it does not appear that any of the whites were arrested (*Ibid.*). White persons merely were requested to leave.

Further confirmation that the policy of enforcing segregation was the City's, appears from how the arrests were made. The police proceeded to the stores in question and

---

[6] See pp. 6-8, *supra*.

without requests to arrest by the management (See "Facts in Common," *supra* p. 12), immediately arrested petitioners. There is no evidence that anyone connected with the stores called the police (*Ibid.*). And petitioners were arrested even when police had no knowledge that anyone had refused to serve (King 23, Hutchinson 23) or had asked them to leave the dining area (Gober 15-17, Davis 16-18; Parker 16-17, West 13-14). The conduct of the stores in these circumstances gives rise to an inference that the store managers were willing to tolerate the demonstrations. As Mr. Justice Harlan has written. There was:

> "... the reasonable inference ... that the management did not want to risk losing Negro patronage in the stores by requesting these petitioners to leave the 'white' lunch counters, preferring to rely on the hope that the irritations of white customers or the force of custom would drive them away from the counters. This view seems the more probable in circumstances when, as here, the 'sitters' behaviour was entirely quiet and courteous, and, for all we know, the counters may have been only sparsely, if to any extent, occupied by white persons." *Garner* v. *Louisiana*, 30 U. S. L. Week 4070, 4082 (Mr. Justice Harlan concurring).

If the stores were willing to cope with the controversy within the realm of social and economic give and take, Birmingham had no constitutional authority to intervene as an enforcer of segregation.

The discriminatory practices in these stores, the demands that petitioners leave and their arrests and convictions, result, therefore, directly from the formally enacted policy of the City of Birmingham, Alabama, and not (so far as this record indicates) from any individual or corporate decision or preference of the management of the

stores to exclude Negroes from the lunch counters. Whatever the choice of the property owners may have been, here the City made the choice to exclude petitioners from the property through its segregation ordinance. This city segregation policy was enforced by petitioners' arrests, convictions, and sentences of imprisonment in the Alabama courts.

The Alabama Court of Appeals dismisses reference to the city segregation ordinance by stating "there is no question presented in the record before us, by the pleading, of any statute or ordinance requiring the separation of the races in restaurants. The prosecution was for a criminal trespass on private property" (Gober 63). (All other convictions were affirmed on authority of *Gober*.) But the Constitution forbids "sophisticated as well as simple-minded modes of discrimination" *Lane* v. *Wilson*, 307 U.S. 268, 275.

By enacting, first, that persons who remain in a restaurant when the owner demands that they leave are "trespassers," and then enacting that restaurateurs may not permit Negroes to remain in white restaurants, the City has very clearly made it a crime (a trespass) for a Negro to remain in a white restaurant.[7]

Exclusion by the trial court of evidence concerning the ordinance and the policy of the City of Birmingham does not negate the fact that Birmingham is enforcing segregation. By Alabama statute all courts of the State are "required" to take judicial notice of the ordinance of the City

[7] Racial segregation imposed under another name often has been condemned by this Court. *Guinn* v. *U. S.*, 238 U.S. 347; *Lane* v. *Wilson, supra; Davis* v. *Schnell*, 81 F. Supp. 872 (S.D. Ala. 1949) aff'd 336 U.S. 933; and see *Louisiana State University and A. & M. College* v. *Ludley*, 252 F. 2d 372 (5th Cir. 1958), cert. denied 358 U.S. 819.

of Birmingham. This Court can and will judicially notice matter that the courts below could notice.[8]

The case thus presents a plain conflict with numerous prior decisions of this Court invalidating state efforts to require racial segregation. *Buchanan* v. *Warley*, 245 U.S. 60; *Brown* v. *Board of Education*, 347 U.S. 483; *Gayle* v. *Browder*, 352 U.S. 903, aff'g 142 F. Supp. 707, 712 (M.D. Ala. 1956); *Holmes* v. *City of Atlanta*, 350 U.S. 879; *Mayor and City Council of Baltimore* v. *Dawson*, 350 U.S. 877; *State Athletic Commission* v. *Dorsey*, 359 U.S. 533; Cf. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715. Note the dissenting opinion of Judges Bazelon and Edgerton in *Williams* v. *Hot Shoppes, Inc.*, 293 F. 2d 835, 843 (D.C. Cir. 1961) (dealing primarily with the related issue of whether a proprietor excluding a Negro under an erroneous belief that this was required by state statute was liable for damages under the Civil Rights Acts; the majority applied the equitable abstention doctrine). Indeed, *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845, 847 (4th Cir. 1959), relied upon by the Alabama Court of Appeals below, indicated that racial segregation in a restaurant "in obedience to some positive provision of state law" would be a violation of the Fourteenth Amendment. See also *Boman* v. *Birmingham Transit Company*, 280 F. 2d 531 (5th Cir. 1960); *Baldwin* v. *Morgan*, 287 F. 2d 750 (5th Cir. 1961).

[8] See Note 4, *supra*.

II.

Petitioners were denied due process and equal protection by convictions for trespass for refusal to leave whites-only dining areas of department stores in which all persons are otherwise served without discrimination.

Even should the convictions be viewed as enforcing an alleged "inalienable property right" (Opinion of the Alabama Court of Appeals, Gober 63) to order customers about within a store the judgments below conflict with principles declared by this Court.

The state by arrest and criminal conviction has "place[d] its authority behind discriminatory treatment based solely on color . . ." Mr. Justice Frankfurter dissenting in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 727, by enforcing a policy of deploying customers within a store on the basis of race. This appears immediately from the complaints, all of which describe the premises upon which petitioners allegedly trespassed as the "*area* used for eating, drinking and dining purposes and located within the building commonly and customarily known as . . ." (emphasis supplied). (See, e.g., Gober 2.) No question arose about the legality of petitioners' presence within the stores —indeed, their patronage was actively solicited—but only whether for reasons of race they might be convicted for failure to move from particular portions of each store where they sought sit-down food service. And when petitioners were asked to leave, they were rejected from the dining areas only—not the stores. Moreover, in the cases of Hutchinson and King (Hutchinson 25, King 25) they were not even asked to leave the dining areas. We have here, therefore, the state racially re-arranging by means of a trespass ordinance the customers within a single store.

Petitioners submit that the state's interest in maintaining such a "property" right is hardly sufficient to negate the well-established principle that the Fourteenth Amendment forbids government to enforce racial discrimination.

That private property may be involved hardly settles a claim that Fourteenth Amendment rights have been denied. *Marsh* v. *Alabama*, 326 U.S. 501, 506; *Buchanan* v. *Warley*, 245 U.S. 60, 74; *United States* v. *Willow River Power Co* 324 U.S. 499, 510; *Shelley* v. *Kraemer*, 334 U.S. 1. The stores were open generally to the public, advertised, and solicited it to purchase generally. The stores were "part of the public life" of the community. *Garner* v. *Louisiana*, *supra* at 7 L. ed. 2d 222 (Mr. Justice Douglas concurring). Negroes and whites were served without distinction except at lunch counters where Negroes were served only in separate sections or were permitted to purchase food to take out. None of the lunch counters contained signs excluding Negroes. All were integral parts of the establishments into which petitioners were invited. Petitioners sought to use the dining areas in their usual, intended manner. *None of the dining sections were treated by the proprietors themselves as private* in any sense except that upon being seated Negroes were denied service. Thus, the "property" right which the state has enforced is a "right" to discriminate among patrons on the basis of race in one particular aspect of the service of a single establishment.

But beyond this, the record demonstrates that the alleged property right being enforced was not in reality being asserted by private proprietors—it was a manifestation of state policy. This policy is, first of all and most clearly, expressed in the Birmingham restaurant segregation Ordinance §369. It is manifested also in a massive statutory and state constitutional structure which impresses segre-

gation on innumerable activities of all of the citizens of Alabama.

See, Alabama Constitution §111 amending §256 (nothing in the Constitution to be construed as creating a right to public education; legislature authorized to provide for education taking into account the preservation of "peace and order" and may authorize parents to send their children to schools "for their own race"). Code of Alabama Title 1 §2 (defines "Negro" and "Mulatto"); Title 52 §24 (authorizes appointment of an Advisory Board for Negro Educational Institutions); Title 52 §§452-455 (maintenance of Alabama A. & M. Institute for Negroes); Title 52 §455(1)-(4) (maintenance of Tuskegee Institute for Negroes only); Title 45 §248 (schools for the mentally deficient to be built taking into account separation of the races); Title 45 §4 (prisoners in tubercular hospitals to be separated on basis of race); Title 14 §§360-361 (marriage, adultery and fornication between Negroes and whites a felony; officer issuing license for such a marriage commits misdemeanor). Alabama Constitution §102 (legislature may never permit interracial marriages). Title 40 §189(19) (white women may not act as nurses in any public or private hospital where Negro men are patients); Title 44 §10 (county homes for the poor to be segregated); Title 51 §244 (a breakdown of the poll tax on the basis of race must be taken); Title 45 §§121-123, 52, 183 (white and Negro prisoners must be separated); Title 48 §§186, 196-197, 464 (Negroes and whites must be separated in railroad coaches and waiting rooms); Title 48 §301 (31a, b, c) (Negroes and whites to be separated on intrastate buses). See *Browder* v. *Gayle*, 352 U.S. 903 (1956).

Segregation is all of a piece. When the state decrees and enforces it at myriad points it hardly can claim that a proprietor who follows massive governmental policy in

racially segregating customers is exercising rights of "private property."

Petitioners submit that it is "irony amounting to grave injustice that in one part of a single building . . . all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen, offensive because of his race. . . ." *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 724. While the excised language (replaced by dots) in the quotation from *Burton* refers to a building "erected and maintained with public funds by an agency of the States," 365 U. S. 715, at 724, the legal significance of the omitted phrase, petitioners submit, was to supply the Fourteenth Amendment element of state action. In *Burton*, where, petitioner was neither arrested nor prosecuted, this element was furnished by the facts that, *inter alia*, "the authority, and through it the state has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination." 365 U.S. 715, at 725. In the instant suit state participation bites more deeply for petitioners have by Alabama courts been branded criminals and relegated to "30 days hard labor for the City."

The "property" right (racial discrimination in accordance with state custom supported by state law) within a single store open to the public which Alabama seeks to preserve by applying the Birmingham trespass ordinance, is so narrow as to not deserve—in face of the Fourteenth Amendment—state protection. Indeed, is the kind of "property right" which many states have taken away without, this Court has held, denying due process of law. *Railway Mail Ass'n* v. *Corsi*, 326 U.S. 88, 93, 94. It is not the sort of "property" right involving considerations entitled to high constitutional protection as, for example, the right of privacy treated in *Mapp* v. *Ohio*, 367 U.S. 643 and see *Poe*

v. *Ullman*, 367 U.S. 497. Cf. *Frank* v. *Maryland*, 359 U.S. 360. Here, indeed, it is a case where the right of private property in a store, part of the public life of the community, should be "limited by the neighborhood of principles of policy which are other than those on which the particular right is founded. . . ." *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, 356. These principles of policy are the principles of the Fourteenth Amendment which forbid the state to enforce racial discrimination. To make policemen ushers within public stores, whose duties are to direct the respective races here and there under threat of jail sentence, petitioners submit, far exceeds anything the Fourteenth Amendment ever has permitted.

III.

The convictions deny due process of law in that they rest on an ordinance which fails to specify that petitioners should have obeyed commands to depart given by persons who did not establish authority to issue such orders at the time given.

In the courts below petitioners asserted that the ordinance in question as applied to them denied due process of law secured by the Fourteenth Amendment to the Constitution of the United States in that it did not require that the persons requesting them to leave the dining areas established or, indeed, asserted their authority to make the demands. In none of the ten records before this court did the persons who demanded that petitioners leave, first inform petitioners or demonstrate to them that they had authority to request that the petitioners leave the areas in question. Only in one pair of cases (Parker 18, West 21) did the witness say that he "identified" himself. Yet there was no evidence that he claimed authority to order petitioners out of the dining area, or indeed, that the witness

possessed such authority. No one ordinarily may be expected to assume that one who tells him to leave a public place, into which the proprietor invited him and in which he has traded, is authorized to utter such an order when no claim of such authority is made.

This is especially true in the case of a Negro seating himself in a white dining area in Birmingham, Alabama—obviously a matter of controversy and on which any stranger might be expected to volunteer strong views. If the statute in question is interpreted to mean that one must leave a public place under penalty of being held a criminal when ordered to do so by a person who later turns out to have been in authority without a claim of authority at the time, it means as a practical matter that one must depart from a public place whenever told to do so by anyone; the alternative is to risk fine or imprisonment. Such a rule might be held a denial of due process. Cf. *Lambert* v. *California*, 355 U.S. 225. But if such is the rule the statute gives no fair warning; absent such notice petitioners surely were entitled to assume that one may go about a public place under necessity to observe orders only from those who claim with some definiteness the right to give them.

Indeed, as a matter of due process of law, if it is the rule one must obey all orders of strangers to leave public places under penalty of criminal conviction if one uttering the order later turns out to have had authority, petitioners are entitled to more warning of its harshness than the ordinance's text affirmed. *Connally* v. *General Construction Co.*, 269 U.S. 385; *Lanzetta* v. *New Jersey*, 306 U.S. 451. Otherwise many persons—like these petitioners—may be held guilty of crime without having intended to do wrong. This Court has said however, that:

> "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or

> transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morrissette* v. *U. S.*, 342 U.S. 246, 250.

Morrissette, of course, involved a federal statute as treated in the federal courts. But it expresses the fundamental view that *scienter* ought generally to be an element in criminality. See Sayre, *Public Welfare Offenses*, 33 Columbia L. Rev. 55, 55-6 (1933). The pervasive character of *scienter* as an element of crime makes it clear that a general statute like the ordinance now in question, in failing to lay down a *scienter* requirement, gives no adequate warning of an absolute liability. Trespass statutes like the one at bar are quite different from "public welfare statutes" in which an absolute liability rule is not unusual. See *Morrissette* v. *United States*, *supra*, 342 U.S. at 252-260.

Indeed, the ordinance in question is significantly different from Code of Alabama, Title 14, §426, which at least exculpates those who enter with "legal cause or good excuse" a phrase missing from the Birmingham ordinance. Cf. *Central Iron Co.* v. *Wright*, 20 Ala. App. 82, 101 So. 815; *McCord* v. *State*, 79 Ala. 269; American Law Institute, Model Penal Code, Tentative Draft No. 2, §206.53, Comment.

On the other hand however, if Alabama were to read a *scienter* provision into this ordinance for the first time—which it has failed to do although the issue was squarely presented in these ten cases—the lack of the necessary element of guilt, notice of authority, patent on the face of all ten records, would require reversal under authority of *Garner* v. *Louisiana*, *supra*; *Thompson* v. *City of Louisville*, 362 U.S. 199.

IV.

The decision below conflicts with decisions of this Court securing the right of freedom of expression under the Fourteenth Amendment to the Constitution of the United States.

Petitioners were engaged in the exercise of free expression, by verbal requests to the management for service, and nonverbal requests to the management for service, and nonverbal requests for nondiscriminatory lunch counter service, implicit in their continued remaining in the dining area when refused service. As Mr. Justice Harlan wrote in *Garner* v. *Louisiana*: "We would surely have to be blind not to recognize that petitioners were sitting at these counters, when they knew they would not be served, in order to demonstrate that their race was being segregated in dining facilities in this part of the country." 7 L. ed. 2d at 235-36. Petitioners' expression (asking for service) was entirely appropriate to the time and place at which it occurred. They did not shout or obstruct the conduct of business. There were no speeches, picket signs, handbills or other forms of expression in the store possibly inappropriate to the time and place. Rather they offered to purchase in a place and at a time set aside for such transactions. Their protest demonstration was a part of the "free trade in ideas" (*Abrams* v. *United States*, 250 U.S. 616, 630, Holmes, *J.*, dissenting), within the range of liberties protected by the Fourteenth Amendment, even though nonverbal. *Stromberg* v. *California*, 283 U.S. 359 (display of red flag); *Thornhill* v. *Alabama*, 310 U.S. 88 (picketing); *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 633-634 (flag salute); *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (freedom of association).

Questions concerning free speech expression are not resolved merely by reference to the fact that private prop-

erty is involved. The Fourteenth Amendment right to free expression on private property takes contour from the circumstances, in part determined by the owner's privacy, his use and arrangement of his property. In *Breard* v. *Alexandria*, 341 U.S. 622, the Court balanced the "householder's desire for privacy and the publisher's right to distribute publications" in the particular manner involved, upholding a law limiting the publishers' right to solicit on a door-to-door basis. But cf. *Martin* v. *Struthers*, 319 U.S. 141 where different kinds of interests led to a corresponding difference in result. Moreover, the manner of assertion and the action of the State, through its officers, its customs and its creation of the property interest are to be taken into account.

In this constitutional context it is crucial, therefore, that the stores implicitly consented to the continuance of the protest and did not seek intervention of the criminal law. For, this case is like *Garner* v. *Louisiana*, *supra*, where Mr. Justice Harlan, concurring, found a protected area of free expression on private property on facts regarded as involving "the implied consent of the management" for the sit-in demonstrators to remain on the property. In none of the cases at bar did anyone other than the police request petitioners to leave the store. In one pair of cases there was not even a request to leave the dining area. The pattern of police action, obviously, was to arrest Negroes in white dining areas. In no case does it appear that anyone connected with the store called the police or subsequently signed an affidavit or complaint. In each case the police officer proceeded immediately to arrest the petitioners without any request to do so on the part of anyone connected with the store.

In such circumstances, petitioners' arrest must be seen as state interference in a dispute over segregation at these

counters and tables, a dispute being resolved by persuasion and pressure in a context of economic and social struggle between contending private interests. The Court has ruled that judicial sanctions may not be interposed to discriminate against a party to such a conflict. *Thornhill* v. *Alabama, supra; San Diego Bldg. Trades Council* v. *Garmon*, 349 U.S. 236.

But even to the extent that the stores may have acquiesced in the police action a determination of free expression rights still requires considering the totality of circumstances respecting the owner's use of the property and the specific interest which state judicial action supports. *Marsh* v. *Alabama*, 326 U.S. 501.

In *Marsh*, this Court reversed trespass convictions of Jehovah's Witnesses who went upon the privately owned streets of a company town to proselytize, holding that the conviction violated the Fourteenth Amendment. In *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, the Court upheld a labor board ruling that lacking special circumstances employer regulations forbidding all union solicitation on company property constituted unfair labor practices. See *Thornhill* v. *Alabama, supra*, involving picketing on company-owned property; see also *N.L.R.B.* v. *American Pearl Button Co.*, 149 F. 2d 258 (8th Cir. 1945); *United Steelworkers* v. *N.L.R.B.*, 243 F. 2d 593, 598 (D.C. Cir. 1956), reversed on other grounds, 357 U.S. 357, and compare the cases mentioned above with *N.L.R.B.* v. *Fansteel Metal Corp.*, 306 U.S. 240, 252, condemning an employee seizure of a plant. In *People* v. *Barisi*, 193 Misc. 934, 86 N.Y.S. 2d 277, 279 (1948) the Court held that picketing within Pennsylvania Railroad Station was not a trespass; the owners opened it to the public and their property rights were "circumscribed by the constitutional rights of those whose use it." See also *Freeman* v. *Retail Clerks Union*,

Washington Superior Court, 45 Lab. Rel. Ret. Man. 2334 (1959); and *State of Maryland* v. *Williams*, Baltimore City Court, 44 Lab. Rel. Ref. Man. 2357, 2361 (1959).

In the circumstances of this case the only apparent state interest being subserved by these trespass prosecutions is support of the property owner's discrimination in conformity to the State's segregation custom and policy and the express terms of the City Ordinance. This is all that the property owner can be found to have sought.

Where free expression rights are involved, the question for decision is whether the relevant expressions are "in such circumstances and . . . of such a nature as to create a clear and present danger that will bring about the substantive evil" which the state has the right to prevent. *Schenck* v. *United States*, 249 U.S. 47, 52. The only "substantive evil" sought to be prevented by these trespass prosecutions is the stifling of protest against the elimination of racial discrimination, but this is not an "evil" within the State's power to suppress because the Fourteenth Amendment prohibits state support of racial discrimination. See *Cooper* v. *Aaron*, 358 U.S. 1; *Terminiello* v. *Chicago*, 337 U.S. 1; *Sellers* v. *Johnson*, 163 F. 2d 877 (8th Circuit, 1947), cert. denied 332 U.S. 851.

Moreover, if free speech under these circumstances is to be curtailed, the least one has a right to expect is reasonable notice in the ordinance under which convictions are obtained, to that effect. Here, absent a statutory provision that the person giving the "warning" have authority to do so, and that he be required to communicate that authority to the person asked to leave, petitioners were convicted on records barren of evidence that such authoritative notice was given. In effect they have been convicted of crime for refusing to cease their protests at the request of persons, who for all the records show, were strangers

at the time. The stifling effect of such a rule on free speech is obvious; under the Fourteenth Amendment, therefore, these convictions are doubly defective in curtailing First Amendment rights. See *Wiemqn* v. *Updegraff*, 344 U.S. 183; *Smith* v. *California*, 361 U.S. 147.

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

JACK GREENBERG
CONSTANCE BAKER MOTLEY
10 Columbus Circle
New York 19, N. Y.

ARTHUR D. SHORES
1527 Fifth Avenue, North
Birmingham, Alabama

PETER A. HALL
ORZELL BILLINGSLEY, JR.
OSCAR W. ADAMS, JR.
J. RICHMOND PEARSON

LEROY D. CLARK
MICHAEL MELTSNER
JAMES M. NABRIT, III
Of Counsel

APPENDIX

Judgment Entry in Gober Case

At a regular, adjourned, or special session of the Tenth Judicial Circuit of Alabama . . .

THE STATE

CITY OF BIRMINGHAM

—VS.—

JAMES GOBER

Appealed from Recorder's Court
(Trespass After Warning)

HONORABLE GEO. LEWIS BAILES, *Judge Presiding*

This the 10th day of October, 1960, came Wm. C. Walker, who prosecutes for the City of Birmingham, and also came the defendant in his own proper person and by attorney, and the City of Birmingham files written Complaint in this cause, and the defendant being duly arraigned upon said Complaint for this plea thereto says that he is not guilty; and defendant files motion to strike, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion the defendant hereby duly and legally excepts; and the defendant files demurrers, and said demurrers being considered by the Court, it is ordered and adjudged by the Court that said demurrers be and the same are hereby overruled, to which action of the Court in overruling said demurrers the defendant hereby duly and legally excepts; and the defendant files motion to exclude the evidence, and said motion being considered

by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion, the defendant hereby duly and legally excepts; and on this the 11th day of October, 1960, the Court finds the defendant guilty as charged in the Complaint and thereupon assessed a fine of One Hundred ($100.00) dollars and costs against said defendant. It is therefore considered by the Court, and it is the judgment of the Court that said defendant is guilty as charged in said Complaint, and that he pay a fine of One Hundred ($100.00) dollars and costs of this cause.

And said defendant being now in open Court, and having presently failed to pay the fine of $100.00 and the costs of $5.00 accrued in the Recorder's Court of the City of Birmingham, or to confess judgment with good and sufficient security for the same, it is therefore considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said James Gober, perform hard labor for the City of Birmingham for fifty-two days, because of his failure to pay said fine and costs of $5.00 accrued in said Recorder's Court, or to confess judgment with good and sufficient security therefor.

It is further considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said James Gober, perform additional hard labor for the City of Birmingham for thirty days, as additional punishment in this cause.

And the costs legally taxable against the defendant in this cause amounting to forty-eight and 75/100 ($48.75) dollars, not being presently paid or secured, and $4.00 of said amount being State Trial Tax, $3.00, and Law Library

Tax, $1.00, leaving forty-four and 75/100 ($44.75) dollars taxable for sentence, it is ordered by the Court that said defendant perform additional hard labor for the County for sixty days, at the rate of 75 cents per day to pay said costs. It is further ordered by the Court that after the sentence for the City of Birmingham has expired, that the City authorities return the defendant to the County authorities to execute said sentence for costs.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in this behalf expended for feeding the defendant while in jail, for which let execution issue.

And on this the 11th day of October, 1960, the defendant files motion for a new trial in this cause, and said motion coming on to be heard and determined by the Court, it is ordered by the Court, and it is the judgment of the Court that said motion be and the same is hereby overruled.

And notice of appeal being given, and it appearing to the Court that, upon the trial of this cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Appeals of Alabama, it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at $300.00, conditioned as required by Law.

Opinion of Harwood, Presiding Judge

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

October Term, 1960-61
6 Div. 797

JAMES GOBER

—v.—

CITY OF BIRMINGHAM

APPEAL FROM JEFFERSON CIRCUIT COURT

HARWOOD, *Presiding Judge*

This appellant was first convicted in the Recorder's Court of the City of Birmingham for violating Section 1436 of the City Code of Birmingham, Alabama, 1944.

Section 1436, *supra,* is as follows:

> "Sec. 1436, *After Warning.* Any person who enters into the dwelling house, or goes or remains on the premises of another, after being warned not to do so, shall, on conviction, be punished as provided in Section 4, provided, that this Section shall not apply to police officers in the discharge of official duties."

On his conviction in the Recorder's Court, the appellant perfected an appeal to the Circuit Court of Jefferson County, where he was again adjudged guilty, and punishment was imposed.

Opinion of Harwood, Presiding Judge

The complaint filed in the Circuit Court reads:

> "Comes the City of Birmingham, Alabama, a municipal corporation, and complains that James Gober, within twelve months before the beginning of this prosecution and within the City of Birmingham or the police jurisdiction thereof, did go or remain on the premises of another, said premises being the area used for eating, drinking, and dining purposes and located within the building commonly and customarily known as Pizitz Department Store, located at 1821 2nd Avenue, North, Birmingham, Alabama, after being warned not to do so, contrary to and in violation of Section 1436 of the General City Code of Birmingham of 1944."

The evidence presented by the City in the trial below tends to show that this appellant, together with one James Davis, went to the cafeteria or lunch room in the Pizitz store and seated themselves at a table. According to the appellant, they could not obtain service from the waitresses.

Shortly, Dick Pizitz, assistant to the President of Pizitz, arrived and asked the appellant and Davis to leave, and told them they could be served downstairs. The appellant and Davis refused to leave. Either the appellant or Davis, upon refusing to leave, suggested that the police be called.

In response to instructions from a superior officer, a police officer of the City of Birmingham went to the restaurant. He found the appellant and Davis still seated at a table, and placed both under arrest.

This being an appeal from a conviction for violating a city ordinance, it is quasi criminal in nature, and subject to rules governing civil appeals. Accordingly we will limit our review to errors assigned and argued in appellant's brief. *Fiorella* v. *City of Birmingham*, 35 Ala. App. 384,

48 So. 2d 761; cert. den. 254 Ala. 515, 48 So. 2d 768; cert. den. 71 S. Ct. 506, 340 U. S. 942, 95 L. Ed. 680; *Ellis* v. *City of Sylacauga*, 36 Ala. App. 687, 63 So. 2d 33; *Parks* v. *City of Montgomery*, 38 Ala. App. 681, 92 So. 2d 683.

In the proceedings below the appellant filed a motion to strike the complaint, which motion was overruled. This ruling is asserted as error in Assignment of Error No. 1.

A motion to strike is not the proper method of testing the sufficiency of a complaint. *Taylor* v. *City of Birmingham*, 35 Ala. App. 133, 45 So. 2d 53; *Byrum* v. *Pharo*, 240 Ala. 564, 200 So. 622. Assignment of Error No. 1 is therefore without merit.

Appellant's Assignment of Error No. 2 avers that the court erred in overruling his demurrer to the complaint.

Ground 1 of the demurrer asserts that the complaint does not charge the defendant with any offense under the laws or Constitution of the State of Alabama; Ground 2, that the complaint is insufficient to support a prosecution in that no offense is charged corrigible by the court; Ground 3, that the complaint is so vague and uncertain as to not apprise the defendant of what he is called upon to defend.

Pretermitting other possible defects, it is clear that all of the grounds are general in nature, and in no wise point out any specific defect in the complaint.

For this reason alone the lower court was justified in refusing to examine the complaint for defects therein, and could properly overrule the demurrer, *Oliveri* v. *State*, 13 Ala. App. 348, 69 So. 357, and a trial court will not be put in error for overruling a demurrer based on general grounds which are not sufficiently specific to point out an alleged defect in the pleading. *Gabiness* v. *City of Tusca-*

loosa, 39 Ala. App. 538, 104 So. 778; *Sarber* v. *Hollon*, 265 Ala. 323, 91 So. 2d 229.

In brief counsel for appellant argues that the complaint is insufficient in not setting forth by whom the appellant was warned to leave the premises.

No ground of the demurrer raised this point in the court below. Even if the complaint be defective in this regard, a premise we do not accept, the defect was amendable. Sec. 238, Tit. 7, Code of Alabama 1940, provides:

> "Either before or after judgment on demurrer, the court must permit an amendment of the pleadings; * * *"

This section is broad and comprehends all pleadings except indictments, and authorizes amendment of complaints in prosecutions for violation of city ordinances, as though it were a complaint in a civil action. *Thomas* v. *State*, 58 Ala. 365.

The alleged defect not having been in any wise raised in the court below, and not pointed out by demurrer, is not available on appeal, and will not be considered. *McElhaney* v. *Singleton*, 270 Ala. 162, 117 So. 2d 376; *Campbell* v. *Jackson*, 257 Ala. 618, 60 So. 2d 252.

Grounds 4, 5, 6, 7 and 8 assert the invalidity of the ordinance (Sec. 1436, *supra*) on various constitutional grounds, *as applied to this defendant*. (Italics ours.) No unconstitutional application of the ordinance to this defendant appears from any of the pleading. Such unconstitutional application would be a matter of evidence. These grounds, setting up a speaking demurrer, necessitated an overruling of the demurrer in this aspect. *Brown* v. *City of Fairhope*, 265 Ala. 596, 93 So. 2d 419; *Kalas* v. *McMahon*, 36 Ala. App. 238, 54 So. 2d 322; *United States Fidelity*

and Guaranty Co. v. *Town of Dothan*, 174 Ala. 480, 56 So. 953.

Appellant's Assignments of Error numbers 3 and 4, respectively, are to the effect that the lower court erred in overruling appellant's motion to exclude the evidence, and in overruling appellant's motion for a new trial. Counsel has made no attempt to separate these assignments for argument in brief, and we will treat them jointly, though we wish to observe that the grounds supporting the motion to exclude the evidence are faulty in several aspects, particularly in setting forth erroneous legal principles as their bases. All grounds specified in support of the motion were defective, and the court properly overruled the motion.

Counsel has argued among other matters, various phases of constitutional law, particularly as affected by the Fourteenth Amendment of the Federal Constitution, such as freedom of speech, in regard to which counsel state: "What has become known as a 'sit-in' is a different, but well understood symbol, meaningful method of communication." Counsel has also referred to cases pertaining to restrictive covenants. We consider such principles entirely inapplicable to the present case.

Counsel also state in brief that " * * * The prosecution adduced no evidence to prove that they had no such constitutional right * * *" that is, to remain in the restaurant after having been requested to leave. In this, counsel are under a misapprehension as to the burden to be carried by the defense. The City having presented evidence tending to show that the appellant remained upon private premises after having been warned by an officer of the company owner to leave, it was under no burden to go further and offer evidence that the appellant's act was done without lawful excuse. This was defensive matter,

the proof of which rested upon the appellant unless the evidence which proved the act also proved the excuse. *Owens* v. *State*, 74 Ala. 401.

As we interpret the argument of counsel for appellant, its tenor may well be illustrated by the following quotations from the brief:

> "Due process and equal protection demand that a Negro be accorded the right to sit at eating counters of privately owned businesses, if he has been a customer in other departments of the store.
>
> * * * * * *
>
> "That the premises were privately owned should not detract from the high constitutional position which such free expression deserves."

We know of no warrant in law validating the principles asserted by counsel.

As aptly stated in *Browder* v. *Gayle*, 142 F. Supp. 707:

> "In their private affairs, in the conduct of their private businesses, it is clear that the people themselves have the liberty to select their own associates and the persons with whom they will do business, unimpaired by the Fourteenth Amendment. The Civil Rights Cases, 109 U. S. 33 S. Ct. 18, 27 L. Ed. 835. Indeed we think that such liberty is guaranteed by the due process of that Amendment."

Even so, there is no question presented in the record before us, by the pleading, of any statute or ordinance requiring the separation of the races in restaurants. The prosecution was for a criminal trespass on private property.

The Pizitz Department Store is a private business—a private enterprise. It has no connection with any governmental agency, federal, State, County or city.

The appellant entered upon the privately owned and operated premises of the store as a licensee by implied invitation. He had no intetest in the premises. While a distinction exists between a licensee and an invitee insofar as liability for negligence on the part of the owner of the premises is concerned, the principles governing appellant's conduct in the present consideration must be governed by the rules pertaining to licensees, for in general, that is the position he occupied even though on the premises by an implied invitation.

The Pizitz store, being the owner of its premises, had a full right to limit the use of its own premises as it saw fit.

By its own choice it could limit the use of any part of its premises. It exercised this right to limit the use of its restaurant.

In the absence of statute, a restaurant owner may accept or reject customers on purely personal choice. *Nance* v. *Mayflower Tavern*, 106 Utah 517, 150 P. 2d 773; *Noble* v. *Higgins*, 158 N. Y. S. 867, 95 Misc. 328.

The right to operate a restaurant on its own premises under such conditions as it saw fit to impose was an inalienable property right possessed by the Pizitz store. The appellant would destroy this property right by attempting to misapply the Fourteenth Amendment, ignoring the provision in that Amendment that grants the right to a private property owner to the full use of his property, that is: "Nor shall any state deprive any person of life, *liberty, or property*, without due process of law." (Italics ours.)

As stated in *Williams* v. *Howard Johnson Restaurant* (C. C. A. 4), 368 Fed. 2d 845, there is an "important distinction between activities that are required by the State and those which are carried out by voluntary choice and without compulsion by the people of the State in accordance with their own desires and social practices."

It is fundamental, and requires no citation of authority, that the grantor of a license, which has not become coupled with an interest, may revoke the license at will.

When the appellant was requested to leave the restaurant by an official of the Pizitz store, and refused to leave, his status as an invited licensee was destroyed, and he was thereafter on the premises as a trespasser. As stated in *Martin* v. *City of Struthers*, 319 U. S. 147, 63 S. Ct. 862, 87 L. Ed. 1313:

> "Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off."

Boynton v. *Virginia*, 81 S. Ct. 132, relied on by the appellant, was decided on the basis of the Federal Interstate Commerce Act, and is to the effect that said act prohibits the exclusion of Negroes from restaurants operated or controlled by an interstate carrier as a part of its business. This doctrine cannot be said to create a constitutional right to trespass on private property, regardless of race.

Likewise, we find the doctrine of *Marsh* v. *State of Alabama*, 326 U. S. 501, 90 L. Ed. 265, inapplicable to the present case. The Marsh case, supra, concerned the right to distribute religious pamphlets on the sidewalk of a company owned town. As stated by the court, this town

though owned by a company, had "all the characteristics of any other American town" insofar as municipal functions were concerned, and therefore should be subjected to constitutional limitations imposed on regular public municipalities. Here we are concerned with a private owner in the use of his private property.

We find no merit in appellant's Assignments numbers 3 and 4.

Assignment of Error number 5 relates to a ruling concerning the admission of certain evidence. Counsel has not argued this assignment in brief, and pretermit consideration thereof.

AFFIRMED.

Order of Affirmance in Gober Case

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

October Term, 1960-61

6 Div. 797

JAMES GOBER

—v.—

CITY OF BIRMINGHAM

APPEAL FROM JEFFERSON CIRCUIT COURT

November 2, 1960
CERTIFICATE FILED

January 30, 1961
TRANSCRIPT FILED

April 18, 1961

Come the parties by attorneys, and argue and submit this cause for decision.

May 30, 1961

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the appellant pay the costs of appeal of this court and of the Circuit Court.

Order Denying Application for Rehearing in Gober Case

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

October Term, 1960-61

6 Div. 797

JAMES GOBER

—v.—

CITY OF BIRMINGHAM

APPEAL FROM JEFFERSON CIRCUIT COURT

June 14, 1961

Now comes appellant, in the above styled cause, and respectfully moves this Honorable Court to grant Appellant a rehearing in said cause, and to reverse, revise and hold for naught its Judgment rendered on, to-wit, the 30th day of May, 1961, and affirming the Judgment of the Circuit Court of Jefferson County, Alabama, and to enter an Order, reversing said Judgment.

ARTHUR D. SHORES
ORZELL BILLINGSLEY, JR.
PETER A. HALL
OSCAR W. ADAMS, JR.
J. RICHMOND PEARSON
Attorneys for Appellant

June 20, 1961

It is ordered that the application for rehearing be and the same is hereby overruled. Per Curiam.

Order Denying Petition for Writ of Certiorari to the Court of Appeals in Gober Case

THE SUPREME COURT OF ALABAMA

Thursday, September 14, 1961

THE COURT MET IN SPECIAL SESSION PURSUANT TO ADJOURNMENT

Present: All the Justices

6th Div. 762

EX PARTE: JAMES GOBER

Petitioner

(RE: JAMES GOBER

—VS.—

CITY OF BIRMINGHAM)

JEFFERSON CIRCUIT COURT

Comes the Petitioner in the above styled cause and the Petition for Writ of Certiorari to the Court of Appeals being Submitted on Briefs and duly examined and understood by the Court,

IT IS ORDERED that the Writ of Certiorari be and the same is hereby denied and the petition dismissed at the cost of the petitioner for which cost let execution issue.

LIVINGSTON, *C.J.*, SIMPSON, GOODWYN and COLEMAN, *JJ.*, Concur

Order Denying Rehearing in Gober Case

THE SUPREME COURT OF ALABAMA

Thursday, November 2, 1961

THE COURT MET PURSUANT TO ADJOURNMENT

Present: All the Justices

6th Div. 762

EX PARTE: JAMES GOBER

Petitioner

(RE: JAMES GOBER

—VS.—

CITY OF BIRMINGHAM)

JEFFERSON CIRCUIT COURT

IT IS HEREBY ORDERED that the application for rehearing filed in the above cause by the petitioner on September 28, 1961, be and the same is hereby overruled.

(LIVINGSTON, *C.J.*, SIMPSON and COLEMAN, *JJ.*, concur.)

Judgment Entry in Roosevelt Westmoreland Case*

At a regular, adjourned, or special session of the Tenth Judicial Circuit of Alabama . . .

THE STATE

CITY OF BIRMINGHAM

—VS.—

ROOSEVELT WESTMORELAND

Appealed from Recorder's Court
(Trespass After Warning)

HONORABLE GEO. LEWIS BAILES, *Judge Presiding*

This the 10th day of October, 1960, came Wm. C. Walker, who prosecutes for the City of Birmingham, and also came the defendant in his own proper person and by attorney, and the City of Birmingham files written Complaint in this cause, and the defendant being duly arraigned upon said Complaint for his plea thereto says that he is not guilty; and defendant files motion to strike, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion the defendant hereby duly and legally excepts; and the defendant files demurrers, and said de-

* The Judgment Entry, Order of Affirmance, Order Denying Rehearing, Order Denying Petition for Writ of Certiorari, and Order Denying Rehearing of Petition for Writ of Certiorari are without material difference in all of the other cases except *Gober*, as to which see pp. 1a to 16a *supra*.

murrers being considered by the Court, it is ordered and adjudged by the Court that said demurrers be and the same are hereby overruled, to which action of the Court in overruling said demurrers the defendant hereby duly and legally excepts; and the defendant files motion to exclude the evidence, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion, the defendant hereby duly and legally excepts; and on this the 11th day of October, 1960, the Court finds the defendant guilty as charged in the Complaint and thereupon assessed a fine of One Hundred ($100.00) dollars and costs against said defendant. It is therefore considered by the Court, and it is the judgment of the Court that said defendant is guilty as charged in said Complaint, and that he pay a fine of One Hundred ($100.00) dollars and costs of this cause.

And said defendant being now in open Court, and having presently failed to pay the fine of $100.00 and the costs of $5.00 accrued in the Recorder's Court of the City of Birmingham, or to confess judgment with good and sufficient security for the same, it is therefore considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said Roosevelt Westmoreland, perform hard labor for the City of Birmingham for fifty-two days, because of his failure to pay said fine and costs of $5.00 accrued in said Recorder's Court, or to confess judgment with good and sufficient security therefor.

It is further considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said Roosevelt Westmoreland, perform additional hard labor for the City of Birmingham

for thirty days, as additional punishment in this cause.

And the costs legally taxable against the defendant in this cause amounting to fifty-two and 55/100 ($52.55) dollars, not being presently paid or secured, and $4.00 of said amount being State Trial Tax, $3.00, and Law Library Tax, $1.00, leaving forty-eight and 55/100 ($48.55) dollars taxable for sentence, it is ordered by the Court that said defendant perform additional hard labor for the County for sixty-five days, at the rate of 75¢ per day to pay said costs. It is further ordered by the Court that after the sentence for the City of Birmingham has expired, that the City authorities return the defendant to the County authorities to execute said sentence for costs.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in this behalf expended for feeding the defendant while in jail, for which let execution issue.

And on this the 11th day of October, 1960, the defendant files motion for a new trial in this cause, and said motion coming on to be heard and determined by the Court, it is ordered by the Court, and it is the judgment of the Court that said motion be and the same is hereby overruled.

And notice of appeal being given, and it appearing to the Court that, upon the trial of this cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Appeals of Alabama, it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at $300.00, conditioned as required by Law.

Order of Affirmance in Roosevelt Westmoreland Case*

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

October Term, 1960-61

6 Div. 805

ROOSEVELT WESTMORELAND

—v.—

CITY OF BIRMINGHAM

APPEAL FROM JEFFERSON CIRCUIT COURT

November 2, 1960
CERTIFICATE FILED

January 30, 1961
TRANSCRIPT FILED

April 18, 1961

Come the parties by attorneys, and argue and submit this cause for decision.

May 30, 1961

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court, there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed, on authority of Gober v. City of Birmingham, 6th Division 797, Ala. App. Ms. It is also considered that the appellant pay the costs of appeal of this court and of the Circuit Court.

* See note p. 17a, *supra*.

Order Denying Rehearing in Roosevelt Westmoreland Case*

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

October Term, 1960-61

6 Div. 805

ROOSEVELT WESTMORELAND

—v.—

CITY OF BIRMINGHAM

APPEAL FROM JEFFERSON CIRCUIT COURT

June 14, 1961

Now comes appellant, in the above styled cause, and respectfully moves this Honorable Court to grant appellant a rehearing in said cause, and to reverse, revise and hold for naught its Judgment rendered on, to-wit, the 30th day of May, 1961, and affirming the Judgment of the Circuit Court of Jefferson County, Alabama, and to enter an Order, reversing said Judgment.

ARTHUR D. SHORES
ORZELL BILLINGSLEY, JR.
PETER A. HALL
OSCAR W. ADAMS, JR.
J. RICHMOND PEARSON
Attorneys for Appellant

June 20, 1961

It is ordered that the application for rehearing be and the same is hereby overruled.

Per Curiam.

* See note p. 17a, *supra*.

Order Denying Petition for Writ of Certiorari in Roosevelt Westmoreland Case*

THE SUPREME COURT OF ALABAMA

Thursday, September 14, 1961

THE COURT MET IN SPECIAL SESSION PURSUANT TO ADJOURNMENT

Present: All the Justices

6th Div. 753

EX PARTE: ROOSEVELT WESTMORELAND

Petitioner

(RE: ROOSEVELT WESTMORELAND

—VS.—

CITY OF BIRMINGHAM)

JEFFERSON CIRCUIT COURT

Comes the Petitioner in the above styled cause and the Petition for Writ of Certiorari to the Court of Appeals being Submitted on Briefs and duly examined and understood by the Court,

IT IS ORDERED that the Writ of Certiorari be and the the same is hereby denied and the petition dismissed at the cost of the petitioner for which cost let execution issue.

LIVINGSTON, *C.J.*, SIMPSON, GOODWYN and COLEMAN, *JJ.*, Concur

* See note p. 17a, *supra*.

Order Denying Rehearing in Roosevelt Westmoreland Case*

THE SUPREME COURT OF ALABAMA

Thursday, November 2, 1961

THE COURT MET PURSUANT TO ADJOURNMENT

Present: All the Justices

6th Div. 753

EX PARTE: ROOSEVELT WESTMORELAND

Petitioner

(RE: ROOSEVELT WESTMORELAND

—VS.—

CITY OF BIRMINGHAM)

JEFFERSON CIRCUIT COURT

IT IS HEREBY ORDERED that the application for rehearing filed in the above cause by the petitioner on September 28, 1961, be and the same is hereby overruled.

(LIVINGSTON, *C.J.*, SIMPSON and COLEMAN, *JJ.*, concur.)

* See note p. 17a, *supra*.

LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
FEB 26 1962
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962

No. 66

JAMES GOBER, JAMES ALBERT DAVIS, ROY HUTCHINSON, ROBERT J. KING, ROBERT PARKER, WILLIAM WEST, ROBERT D. SANDERS, ROOSEVELT WESTMORELAND, JESSIE WALKER and WILLIE J. WILLIS,
Petitioners,

vs.

CITY OF BIRMINGHAM,
Respondent.

BRIEF

On Behalf of Respondent to Petition for Writ of Certiorari.

WATTS E. DAVIS,
WILLIAM C. WALKER,
EARL McBEE,
600 City Hall Building,
Birmingham, Alabama,
Attorneys for Respondent.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

INDEX

	Page
Questions presented for review	1
Statement in opposition to constitutional and statutory provisions involved	3
Statement in opposition to jurisdiction of the court	3
Statement	4
Facts in common	7
How Federal questions were raised and decided below	8
Argument	9
Re: Lack of jurisdiction of the court	9
Re: Questions presented for review	11

Cases Cited.

Browder v. Gayle, 142 F. Supp. 707	14
Campbell v. Jackson, 257 Ala. 618, 60 So. 2d 252	12
Dudley Brothers Lumber Co. v. Long, 109 So. 2d 684, 268 Ala. 565	17
Garner v. State of Louisiana, 82 S. Ct. 248 (1961)	11, 14, 18, 19
Gilbert v. Mathews, 1960, 352 P. 2d 58, 186 Kan. 672	16
Lambert v. People of State of California, Cal. 1957, 78 S. Ct. 240, 355 U. S. 255, 2 L. Ed. 2d 228, rehearing denied 78 S. Ct. 410, 355 U. S. 937, 2 L. Ed. 2d 419	15
Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO, v. Missouri, 805 S. Ct. 391, 361 U. S. 363, 4 L. Ed. 2d 373	12
Martin v. Struthers, 319 U. S. 147, 63 S. Ct. 862, 87 L. Ed. 1313	14
Mazer v. Brown, 66 So. 2d 563, 259 Ala. 449	17

Smith v. State, 136 So. 270, 271, 223 Ala. 346 16
Standard Oil Co. v. City of Marysville, Kan., 1929, 49 S. Ct. 430, 279 U. S. 582, 73 L. Ed. 856, rehearing denied 50 S. Ct. 79, motion denied 51 S. Ct. 38, 282 U. S. 797, 75 L. Ed. 718 16
The Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835 13

Statutes and Rules Cited.

Code of Alabama, Title 7, Section 225 12
General City Code of Birmingham, Section 369 (1944) 3, 11
28 U. S. C. A., Supreme Court Rule 21 (1) 3, 10
28 U. S. C. A., Supreme Court Rule 24 (2) 10
28 U. S. C. A., Supreme Court Rule 33 (1) 3, 10

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 694.

JAMES GOBER, JAMES ALBERT DAVIS, ROY HUTCHINSON, ROBERT J. KING, ROBERT PARKER, WILLIAM WEST, ROBERT D. SANDERS, ROOSEVELT WESTMORELAND, JESSIE WALKER and WILLIE J. WILLIS,
Petitioners,

vs.

CITY OF BIRMINGHAM,
Respondent.

BRIEF

On Behalf of Respondent to Petition for Writ of Certiorari.

QUESTIONS PRESENTED FOR REVIEW.

Your respondent is not satisfied with the statement contained in the petition for writ of certiorari (pp. 2; 3)* setting forth the questions presented for review by this Court.

* Page references contained herein and preceded by the letter "p" designate pages in petitioners' Petitions for Writ of Certiorari.

Respondent submits that question number 1 of the petition is not properly before the Court for consideration. The question has to do with a city ordinance separate and apart from the ordinance under which petitioners were charged below. No ordinance fitting the description of the one referred to in question number 2, having to do with segregation in eating facilities, was ever injected into the trial below, either by pleadings or by proof, or by any identification whatever.

Question number 2, having to do with whether Negroes may be excluded from eating areas in stores while being served elsewhere in the stores, involves no constitutional or federal question, unless the petitioners' question be predicated upon the state or its agency exercising the privilege of exclusion on the premises.

Question number 3, which is hypothecated on the supposition that petitioners were "convicted of trespass for seeking nonsegregated food service at white-only dining areas", completely evades the **trespass ordinance** under which the petitioners were in fact charged and convicted.

The question further asserts the "convictions" were upon "records barren of evidence that any person making the requests to leave identified his authority to make the requests".

The question of whether the person making the request to leave **identify** his authority to do so is one involving purely the scope a state or local law as to whether the identification is required, and is not a federal question.

Question number 4, which petitioners present for review, dealing with the assumed failure of the managers to phone the police and demand prosecution, does not present a constitutional or federal question, but seeks only a review of local procedural law.

STATEMENT IN OPPOSITION TO CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

This case does not involve Section 369 (1944) of the General City Code of Birmingham, as proposed in Petition for Writ (pp. 3, 4).

This section of the city code is here raised for the **first time**, has not been a matter for review in any of the state courts, and therefore is not properly includable in the petition as an ordinance for consideration by the court.

STATEMENT IN OPPOSITION TO JURISDICTION OF THE COURT.

I.

Counsel for petitioners has failed to notify the respondent or respondent's counsel of record, either on a form supplied by the Clerk of the Court or otherwise, of the date of filing of the petition for certiorari in this case, or of the docket number of the case, or of the filing of the record with the Court as required by supreme court rules. **Supreme Court Rule 21 (1)**, 28 U. S. C. A., **Supreme Court Rule 33 (1)**, 28 U. S. C. A.

II.

That petitioners have not been deprived of rights, privileges, or immunities secured by the Constitution of the United States.

III.

If, in fact, there be any jurisdiction in this Court in this cause, it is confined to the state appellate courts' rulings on assignments of errors 3 and 4, having to do with mo-

tions to exclude the evidence and motions for new trial, respectively, both of which motions were identical in language in each case below, except with reference to designating the respective stores involved.

Assignments of error 1 and 2, having to do with the overruling by the court of first instance of motions to strike the complaints and demurrers to the complaints, were decided upon adequate and independent state grounds as opposed to federal grounds.

STATEMENT.

As set forth in petitioners' statement (p. 5), the petitioners were all convicted below for having trespassed after warning in violation of a city code provision (Sec. 1436).

While a great portion of the record in each of the cases is consumed with details concerning the respective petitioners going upon the premises of the various department stores, the gravamen of the offense charged in each instance was that the petitioners remained on the premises described in the respective complaints after being warned not to do so.

Gober and Davis:

City witness Gottlinger, Controller for Pizitz Department Store, testified he heard the assistant to the president of the store, while conversing with the two petitioners, Gober and Davis, ask the petitioners to leave the tea room and told them they could be served in the Negro restaurant in the basement (Gober 20, Davis 22); that the petitioners did not leave, but remained until the officers arrived (ibid).

Police Officer Pearce testified (Gober 39, Davis 40), with reference to a conversation he had with Davis and Gober

the day following their arrest, "they (the petitioners) said they were instructed to go into the store and sit down at a white lunch counter, and that they would probably be or would be asked to leave, and not to leave but to remain there until the police arrested them and took them out".

Police Officer Martin (Gober 17-18, Davis 18-19) was told by a superior officer to go to Pizitz Store because of a disturbance there. Upon arrival at Pizitz Store, there were people in the store talking to his superior officers, and he was ordered by his immediate superior to make the arrest.

The petitioners (Davis 43-44, Gober 44-45) did not bother to ask the identity of the person who told them to leave.

Hutchison and King:

Petitioners' statement asserts that "the only disturbance, however, was that '. . . the waiters left the floor' ".

The record (King 28, Hutchison 28) shows a commotion was started by all the white patrons "getting up and leaving the area" when the Negroes were seated.

On three occasions the store detective announced within three feet of the petitioners that the place was closed and asked that the people move, in addition to hanging up a sign stating the place was closed (Hutchison 26, King 26).

Parker and West:

Mrs. Gibbs, store detective at Newberry's (Parker 21; West 18), identified herself to the petitioners and "told them they would have to leave", and testified that petitioners "said they were not going to leave" (ibid).

Mr. Stallings, assistant store manager (Parker 23, West 20), told the petitioners, "You know you can't do this"; that petitioners "kept sitting there and said, 'We have our rights'" (ibid).

Mrs. Gibbs further informed the petitioners (Parker 21, West 18) that they could be served on the fourth floor, and on cross-examination stated that only colored people were served on the fourth floor (Parker 22, West 19).

Sanders and Westmoreland:

In this instance, the petitioners concede in their statement (p. 11) that it was testified that "the manager asked the petitioners to leave the store" (Sanders 20 Westmoreland 17). Petitioners then state that on cross-examination (p. 11) the witness, who was manager of the luncheon counter, explained he had reference only to leaving "that section" and that the store was not mentioned.

This latter assertion of petitioners is incorrect and out of context. The witness was asked, ". . . what was the statement Mr. Braswell (store manager) made to these two boys in your presence?" (Sanders 20, Westmoreland 17). The answer was "He asked them to leave the store" (ibid). On cross-examination the witness (lunch counter manager) was asked what he (the witness) told the boys. He stated he asked them to leave "that section". No part of the cross-examination at any time referred to the statement of the store manager demanding that the petitioners leave the store.

However, this matter seems only academic and abstract, since the complaints filed by respondent dealt specifically with petitioners' remaining "on the premises of another, said premises being the area used for eating, drinking and dining purposes and located within the building . . .", designating each respective building (Sanders 2, Westmoreland 2).

Walker and Willis:

Mrs. Evans, manager of the luncheon counter at Woolworth, told the boys to leave, that the place was closed, and that she would not serve them (Walker 18, Willis 15). When the officer arrived, the lights over the luncheon counter were turned out and, "Mrs. Evans was there waiting for the officer" (Walker 17, Willis 14).

Mrs. Evans told the officer that she wanted them out of the store, though on cross-examination the words "luncheon counter" were substituted for the word "store".

FACTS IN COMMON.

Respondent takes this occasion to avail itself of the privilege of supplying certain corrections and additions to the petitioners' statement under the above topical heading.

While the evidence, as stated by petitioners, does not in fact show that any of the officials of the various department stores stated specifically to any of the petitioners that their official positions and capacities with the respective stores carried specific authority, in writing or otherwise, to order persons off the premises, neither is it shown anywhere in the record that any of the store officials lacked such authority. In no instance did the petitioners ask for any credentials from the persons ordering them to leave, nor did any petitioner, as revealed by the record question in any manner the authority of the respective officials to speak on behalf of the property owners.

While the record does not disclose who reported the behavior of the petitioners in the various stores involved, to the police, the record is conspicuously absent of any attempt on the part of petitioners to question any police official or police records concerning the matter of who, in fact, reported the incidents to the police.

Petitioners' conclusion that the management of the various stores was prohibited by an existing city ordinance to serve Negroes was in no way raised by the pleadings in the trial court, nor is the ordinance anywhere set out in the record. No reference whatever was made to any such ordinance by way of assignment of error in the state appellate court.

The record shows no mention of any such ordinance was ever made at the time of the arrest of the respective petitioners, or at any time thereafter.

HOW FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW.

Respondent wishes to call the Court's attention to certain inaccuracies in petitioners' statement under the above topical heading (pp. 14, 15) and to supply certain additions thereto as follows:

1. The motions to strike the complaint below did **not** contain the following ground as asserted by petitioners, namely, "that section 1436 (city code) denied due process of law secured by the 14th amendment in that it was unconstitutionally vague **by not requiring that the person making the demand to depart identify his authority.**" (Emphasis supplied.)

2. No mention of the words "identify" or "authority", or words vaguely resembling same, are to be found anywhere in the motions to strike, each of which motions is found on page 2 of the respective records.

Petitioners make the same assertion as to grounds contained in their **demurrers.** Again, no such language is anywhere to be found in any of the grounds for the demurrers, which demurrers appear on pages 3 and 4 of the respective records.

3. **The motions to strike and the demurrers** were overruled on independent state grounds rather than on any federal questions, as shown by opinion of state appellate court copied into the petition for writ (pp. 6a, 7a).

4. No motion to exclude the evidence is shown by the record in the case of Roosevel Westmoreland, consequently, such a motion was not before the state courts.

5. None of the written motions to exclude the evidence in the court below, which were all in identical language, sought any relief. No prayer for any action on the part of the lower court was inserted in the motion. The motion to exclude the evidence moved for no action or relief from the court. The motions were, in fact, simply a documentation of supposed law and fact, and the court below had nothing before it upon which to afford any relief to the petitioners.

ARGUMENT.

Re: Lack of Jurisdiction of the Court.

Respondent insists the Court is without jurisdiction to entertain the "petition for writ of certiorari" in this cause, for that the petition was not served upon either of the counsel of record for respondent, namely, Watts E. Davis or Bill Walker, later referred to as William C. Walker, whose names clearly appear upon the face of the title pages appearing in each of the respective records now before the Court in this cause as the only counsel of record.

The **Gober** case below is reported in 133 So. 2d 697. The other nine petitioners' cases below immediately follow **Gober** and are reported in sequence. Each of these published decisions, both in the Court of Appeals and the Supreme Court, shows "Watts E. Davis and William C. Walker for Appellee."

The proof of service, Form 75 (8-61-10M), as supplied by the Clerk and subsequently filed with the Clerk of this

Court, demonstrates clearly that notice of the filing of the petition, the record and proceedings and opinion of the Court of Appeals of Alabama and of the Supreme Court of Alabama, was served upon "Hon. MacDonald Gallion, Mr. James M. Breckenridge." Service of the notice, which is required by **Supreme Court Rule 21 (1)**, 28 U. S. C. A.,[1] to be made as required by **Supreme Court Rule 33 (1)**, 28 U. S. C. A.,[2] was attempted to be accomplished by use of the mail. **Supreme Court Rule 33 (1)**, 28 U. S. C. A., requires that **service by mail shall be addressed to counsel of record** (emphasis supplied) at his post office address, which, as shown *supra*, was not done in this case.

It is your respondent's position that the petitioners' failure to comply with the reasonable rules of this Court in the above regard, whether done through carelessness or indifference to the rules of this Court, leaves the respondent without notice of the proceedings pending in this cause, as required by law, and that the Court is without jurisdiction to proceed without the necessary parties to the writ before the Court, and that the petition for writ seeking certiorari should be dismissed or denied.

The rules of this Court, **Supreme Court Rule 24 (2)**,[3] 28 U. S. C. A., do not provide for a separate motion to

---

[1] The pertinent provision of Supreme Court Rule 21 (1) reads, "Review on writ of certiorari shall be sought by filing with the clerk, with proof of service as required by Rule 33, forty printed copies of a petition. . . ."

[2] The pertinent provision of *Supreme Court Rule* 33 reads, "Whenever any pleading, motion, notice, brief or other document is required by these rules to be served, such service may be made personally or by mail on each adverse party. If personal, it shall consist of delivery, at the office of counsel of record, to counsel or a clerk therein. If by mail, it shall consist of depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to counsel of record at his post office address. . . ."

[3] "No motion by a respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the court to grant writs of certiorari may be included in briefs in opposition to petitions therefor."

dismiss a petition for writ of certiorari upon any grounds, and absent the remedy of any such motion, respondent prays that nothing contained in its reply brief shall be considered as a waiver of its question presented here to the jurisdiction of the Court.

ARGUMENT.

Re: Questions Presented for Review.

I.

Petitioners ask in their petition (p-2, paragraph 1) a determination of whether due process was denied them when they were arrested and convicted for a trespass, for failure to leave a dining area, where their exclusion was allegedly required by some other ordinance ordering "segregation in eating facilities".

The ordinance referred to by petitioners, allegedly requiring segregation in eating establishments, is cited as appearing in the General City Code of Birmingham, in Section 369 (1944).

This question has not heretofore been injected into the case, either by pleadings or by proof below, or by assignment of error or argument before the appellate courts of Alabama. The record will disclose that no identity of any such ordinance was ever suggested in the trial court, nor was any request made to the court to take judicial notice of any such ordinance. The complaint filed against the petitioners in the court of first instance was attacked by lengthy pleadings, none of which put in issue the existence of any such ordinance. The respondent was never afforded any opportunity or right of reply or challenge to same, or even the right to dispute same. As in **Garner v. State of Louisiana**, 82 S. Ct. 248 (1961), Mr. Chief Justice Warren, in delivering the opinion of the Court, stated: "There

is nothing in the records to indicate that the trial judge did in fact take judicial notice of anything."

The trial de novo in the County circuit court below, although quasi criminal, is tried as are other civil actions, and complaints are amendable as in civil actions. **Campbell v. Jackson**, 257 Ala. 618, 60 So. 2d 252.

Code of Alabama, Title 7, section 225, says in part as follows: "The defendant may plead more pleas than one without unnecessary repetition; and, if he does not rely solely on a denial of the plaintiff's cause of action, **must plead specially the matter of defense**". (Emphasis supplied.)

Assuming the existence of such an ordinance, petitioners did not seek to avail themselves of its benefits in any court below, and cannot avail themselves in this Court of some remedy not sought in the state courts. Such a constitutional question as might be raised by the consideration now of the ordinance must be dealt with only as it is appropriately raised upon the record before this Court. **Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO v. Missouri**, 805 S. Ct. 391, 361 U. S. 363, 4 L. Ed. 2d 373.

It should be noted that **civil** rules of appeal govern appeals from a conviction for violating a city ordinance to a state appellate court in Alabama, as noted in the opinion below in this case, and as copied into the petition for writ (p-5a), which opinion below cites numerous Alabama decisions in support of the rule and states: "Accordingly, we will limit our review to errors assigned and argued in appellants' (petitioners') brief."

The only function which judicial notice can serve is to dispense with **proof**, and **it cannot serve to dispense with pleadings**, as substantiated by the fact the rules relating to judicial notice are rules of evidence rather than rules of

pleadings. Since the alleged ordinance was not pleaded in the trial court and appears nowhere in the record before the state appellate courts, it is not appropriate to now raise the subject for the first time in this Court.

II.

Petitioners' second question sought to be reviewed by this Court, poses the question of whether due process is denied when one is convicted of trespass for refusal to leave a whites-only dining area in a store, where he is served without discrimination elsewhere in the store.

This identical question is argued by petitioners (p. 23-27) under the topical heading of Reasons for Granting the Writ (p. 18), and respondent directs its argument here both to the question and to the argument in support of petitioners' reason for granting the writ.

The argument of petitioners is basically encompassed within the statements that, "We have here, therefore, the state racially rearranging by means of a trespass ordinance the customers within a single store" (p. 23); and, "That private property may be involved hardly settles a claim that Fourteenth Amendment rights have been denied" (p. 24).

The Civil Rights Cases, 109 U. S. 3; 3 S. Ct. 18, 27 L. Ed. 835, should clearly answer both contentions of the petitioners, in stating: "Individual invasion of individual rights is not the subject matter of the (Fourteenth) Amendment."

The trespass ordinance complained of by petitioners does no more, nor no less, than afford a right to an individual to warn persons to leave his premises for whatever purpose he may desire. If his warning is regarded by others as infringing upon their rights, their remedy is not in the

Fourteenth Amendment to the Constitution. The ordinance is simply a codification of a property right already afforded the property owners by the Fourteenth Amendment, and affords a simple and expeditious manner of enforcing this right. This Court aptly stated in **Martin v. Struthers**, 319 U. S. 147, 63 S. Ct. 862, 87 L. Ed. 1313, that, "Traditionally, the American law punishes those who enter onto the property of another after having been warned to keep off".

Mr. Justice Douglas emphasized in **Garner v. State of Louisiana**, 82 S. Ct. 248 (1961) that, "So far as the Fourteenth Amendment is concerned, individuals can be as prejudiced and intolerant as they like."

The trespass ordinance might well be the subject of attack if it were available only for the protection of the property of one race or another, but petitioners do not urge that Negroes are not entitled to the availability of the benefits of the ordinance. Simply, petitioners say it should not be used by whites against members of the colored race; or perhaps vice versa.

As to rearranging a store racially by application of the ordinance, it appears to the respondent that this may be done, whether by prejudice or otherwise on the part of the store owner. **Garner, supra.** This proposition finds further support in **Browder v. Gayle**, 142 F. Supp. 707.

The department stores, while paying a license tax, were privately owned as opposed to being publicly owned or financed by public funds. The state appellate court held the stores to be "a private business—a private enterprise" (p. 10a).

III.

Petitioners seek review of question 3 (p. 3), which, in substance, asks whether due process was denied where

the record was "barren of any evidence that any person making the request to leave identified his authority to make the request".

The question presented is **not** whether the persons ordering the petitioners to leave **actually had such authority**, but, as stated in lead paragraph III of petition (p. 27) in a corollary statement of the question, whether the failure of the ordinance "to specify that petitioners should have obeyed commands to depart given by persons who did not establish authority to issue such orders at the time given", denied petitioners due process of law.

Petitioners are simply arguing that the ordinance should contain an additional provision requiring the person making the order to leave identify his authority to make such order, and that the failure of the ordinance to so provide is violative of due process.

Such an argument, in effect, implies that the ordinance should provide a means whereby an arsonist, vandalist or trespasser must be confronted with a deed to the property, and that the validity of the deed must be substantiated before the ordinance could be free itself of a denial of due process, or in absence of a deed, to spell out the authority for the command in some other fashion satisfactory to the trespasser or intruder.

The wisdom of adding such a provision to the trespass ordinance is certainly open to grave question, but the question of wisdom, propriety, or desirability is one for the legislative body of this city to concern itself with, and not one for this Court.

"The principle that of all the powers of local government the police power is one of the least limitable is deep in our law . . ." **Lambert v. People of State of California,** Cal. 1957, 78 S. Ct. 240, 355 U. S. 255, 2 L. Ed. 2d 228,

rehearing denied 78 S. Ct. 410, 355 U. S. 937, 2 L. Ed. 2d 419.

"Once a subject is found to be within scope of state's police power the only limitations upon exercise of that power are that regulations must have reference in fact to welfare of society and must be fairly designed to protect the public against evils which might otherwise occur, and within these limits legislature is sole judge of nature and extent of measures necessary to accomplish its purpose." **Gilbert v. Mathews**, 1960, 352 P. 2d 58, 186 Kan. 672.

The question of whether the legislative body of the city should have placed additional restrictions upon property owners in safeguarding their property against trespassers, as urged by petitioners, is not properly a question for this Court, and has so been decided many times. Such principle was affirmed in the following language in the case of **Standard Oil Co. v. City of Marysville, Kan.**, 1929, 49 S. Ct. 430, 279 U. S. 582, 73 L. Ed. 856, rehearing denied 50 S. Ct. 79, motion denied 51 S. Ct. 38, 282 U. S. 797, 75 L. Ed. 718, wherein it was stated, "Where legislative action is within scope of the police power, **fairly debatable questions** (emphasis supplied) as to its reasonableness, wisdom and propriety are not for the determination of courts but for that of the legislative body on which rests the duty and responsibility of decision."

Petitioners also argue that a scienter requirement should have been laid down in the ordinance. This, too, is the province of the legislative body, and has so been ruled by this Court, and in the Alabama Supreme Court. **Smith v. State**, 136 So. 270, 271, 223 Ala. 346, states, "The doing of the inhibited act constitutes the crime, and the moral turpitude or purity of the motive by which it was prompted and knowledge or ignorance of its criminal char-

acter are immaterial circumstances on the question of guilt. Whether or not in a given case a statute is to be so construed is to be determined by the court by considering the subject matter of the prohibition as well as the **language of the statute** (emphasis supplied), and thus ascertaining the intention of the legislature."

Petitioners argue that the trespass ordinance gives no fair warning of its "harshness" (p. 28). In light of the fact that petitioners in some instances suggested calling the police, refused to leave when afforded an opportunity to leave, and insisted on their rights to remain, this argument seems little more than spurious.

Of more importance in considering petitioners' question for review number 3, is the question of how it was asserted in the state court. Ground number 5 of the motions to exclude the evidence, which were filed in only some of the cases below (Gober 5, Davis 5, Hutchison 5, King 5, Parker 5, Sanders 5, Walker 5), did in different terms raise the question. Only at this point is it raised.

However, in Alabama it is held, "The rule that in respect to a motion to exclude all of the plaintiff's evidence in a civil case, is that the trial court will not be put in error for refusing the motion, nor will it be put in error for granting it if the evidence does not make out a prima facie case. **Dudley Brothers Lumber Co. v. Long**, 109 So. 2d 684, 268 Ala. 565. In other words, under Alabama decisions a motion to exclude the evidence is **not reviewable** by the appellate court. The **affirmative charge** is the only way to make it reviewable. **Mazer v. Brown**, 66 So. 2d 563, 259 Ala. 449.

IV.

Question number 4, presented by petitioners (p. 3) and argued under Reasons for Granting the Writ (pp. 30-34), is whether freedom of expression was denied petitioners where, as petitioners allege, the managers did not call the police or demand prosecution "and were apparently willing to endure the controversy without recourse to criminal process".

Petitioners refer to Mr. Justice Harlan's concurring opinion in **Garner v. State of Louisiana**, 82 S. Ct. 248 (1961), in which there was found a protected area of free expression on private property on facts regarded as involving "the implied consent of management . . .". Respondent is in full accord with this recent affirmance of established law. Mr. Justice Harlan, in the foregoing opinion, affirmed also, "This is not to say, of course, that the Fourteenth Amendment reaches to demonstrations conducted on private property over the objection of the owner (as in Briscoe) just as it would not encompass verbal expression in a private home if the owner has not consented".

For one reason or another, it appears from the petitioners' argument that if a **demonstration** is involved, the case for free speech becomes stronger. Whatever may be the significance of the word **demonstration**, the facts in these cases do not indicate to your respondent that demonstrations were involved in these cases.

According to the records, certain things were common in each of the cases. None of the petitioners carried placards or handbills. None of the petitioners made or attempted to make speeches. No one resisted arrest in any manner so as to attract attention. None of the usual fanfare of photographers and newspaper people were in attendance as is customary for demonstrations. One of the

petitioners (Gober 19, Davis 20) suggested that the police be called, indicating that his extended presence on the premises was not of importance. One of the petitioners (Gober 42, Davis 43) stated the nature of his business was to "shop", and that he purchased socks, toothpaste, and a handkerchief (ibid). He stated further he was there for "a snack" (Gober 48, Davis 49). Another of the petitioners (West 26, Parker 25) stated he purchased comic books and paper. He further testified (ibid) that he said to Parker, "Let's go over here and get something to eat."

The only inference your respondent can fairly draw from the behavior of the petitioners in the stores is that their mission was to provoke an arrest and not to stage anything in the nature of a demonstration. The fact that only two students were involved in each store lends further credence to this conclusion. Under the facts as presented in the records, it would appear that the petitioners were accorded everything they sought in each of the stores, and that their right to precipitate litigation was in no way impeded nor denied them, but quite to the contrary. It must be assumed, and it is not denied, that the plans of the petitioners proceeded as they expected them to.

It is difficult for your respondent to see wherein the matter of free speech was in any way involved in the incidents which took place in the various stores. Assuming, however, that your respondent is in error in this regard, this Court's recent expression through Mr. Justice Harlan in **Garner**, supra, would deny petitioners Fourteenth Amendment protection while demonstrating on the private property of another after being told to leave.

The fact that the store owners may have maintained separate eating facilities for Negroes out of prejudice or racial intolerance is of no legal significance. As Mr. Justice Douglas wrote in **Garner v. Louisiana**, supra, "So far

as the Fourteenth Amendment is concerned, individuals can be as prejudicial and intolerant as they like."

Much of petitioners' argument is directed to the manner in which the police made the arrest. Evidently, the petitioners are under the impression that witnesses to a crime or punishable offense are to blind themselves to what they see and make no report to law enforcement officers. As often as not, the victim is preoccupied and hardly in a position to make a timely report to the police.

In either event, however, the record is silent as to who in fact made the report to the police department, other than the testimony that a store detective was waiting for the police in one instance, Newberry Store (Parker 23, West 20), and at another, an officer made an arrest after his superior officers discussed the matter with people in the store and he was ordered to make the arrest (Gober 17-18, Davis 18-19).

Petitioners made no attempt, as shown by the record, to avail themselves of any of the records kept in the police department of complaints made by phone, nor does the record disclose that they attempted to get the information as to the source of the complaint by interrogating any of the officials of the police department on the subject in the trial below.

Where an offense has been committed, as in these instances, where the petitioners had been told to leave the dining area and they refused, it is not essentially the problem of the store owners to establish law enforcement policy for the City. After the intruders were told by the owners or their agents to leave and the owners were confronted with defiance and refusal of their order, an offense had been committed, punishable under the city code, and the question of then entering upon a "social and economic give and take" between the store owner and the offender would necessarily be pre-empted.

Wherefore, for the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

WATTS E. DAVIS,

WILLIAM C. WALKER,

EARL McBEE,
600 City Hall Building,
Birmingham, Alabama,
Attorneys for Respondent.

LIBRARY
SUPREME COURT. U. S.

Office-Supreme Court, U.S.
FILED
MAR 16 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 66

JAMES GOBER, JAMES ALBERT DAVIS, ROY HUTCHINSON, ROBERT J. KING, ROBERT PARKER, WILLIAM WEST, ROBERT D. SANDERS, ROOSEVELT WESTMORELAND, JESSIE WALKER, WILLIE J. WILLIS,

Petitioners,

—v.—

CITY OF BIRMINGHAM,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF APPEALS

REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

JACK GREENBERG
CONSTANCE BAKER MOTLEY
10 Columbus Circle
New York 19, N. Y.

ARTHUR D. SHORES
1527 Fifth Avenue, North
Birmingham, Alabama

LEROY D. CLARK
MICHAEL MELTSNER
JAMES M. NABRIT, III
LOUIS H. POLLAK
of Counsel

PETER A. HALL
ORZELL BILLINGSLEY, JR.
OSCAR W. ADAMS, JR.
J. RICHMOND PEARSON
Attorneys for Petitioners

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 694

JAMES GOBER, JAMES ALBERT DAVIS, ROY HUTCHINSON, ROBERT J. KING, ROBERT PARKER, WILLIAM WEST, ROBERT D. SANDERS, ROOSEVELT WESTMORELAND, JESSIE WALKER, WILLIE J. WILLIS,

Petitioners,

—v.—

CITY OF BIRMINGHAM,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF APPEALS

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

Petitioners have received respondent's Brief in Opposition to the Petition for Certiorari filed in this case and hereby reply pursuant to Rule 24(4) of the Rules of this Court.

I.

Adequacy of service.

Respondent claims (Br. of Respondent, 5, 9, 10) that this Court lacks jurisdiction to entertain the Petition because the Petition and Notice of Filing of the Petition were served upon MacDonald Gallion, Attorney General of the

State of Alabama, and James M. Breckenridge, rather than Watts E. Davis and William L. Walker. Messrs. Walker and Davis are Assistant City Attorneys of Birmingham; Mr. Breckenridge, upon whom service was made, is their superior, the City Attorney, as is evidenced by copy of the letter accompanying Respondent's Brief in Opposition, reproduced, *infra*, p. 1a. Petitioners submit, therefore, that this objection is without merit, see *infra*, p. 1a.

II.

Mode of raising constitutional questions.

Respondent implies that petitioners did not properly raise constitutional objections in the courts below and that petitioners' constitutional objections were not passed upon by the Alabama Courts.

Specifically, respondent argues that Birmingham's segregation in eating facilities ordinance was not *pleaded* in the trial court and does not appear in the records and that, therefore, this Court should not consider it now. The theory of judicial notice is, however, that regarding propositions involved in the pleadings, or relevant thereto, *proof* by evidence may be dispensed with. 9 Wigmore, §2565, p. 531. As it is beyond question that the Courts of Alabama are required to judicially note ordinances of the City of Birmington, see Br. of Petitioners, 7, n. 4,[1] the only possible objection which can be made is that the

[1] Title 7, Code of Alabama, 1940, Section 429(1) (Approved June 18, 1943) states:

"JUDICIAL NOTICE OF THE ORDINANCES OF CERTAIN CITIES.—All courts in or of the State of Alabama shall take judicial notice of all the ordinances, laws and bylaws of cities of the State of Alabama which may now or hereafter have a population of 200,000 or more people according to the last or any succeeding federal census."

ordinance is not relevant to questions raised by the pleadings. Petitioners, however, clearly raised the contention that they were arrested, prosecuted and convicted because of state enforcement of segregation (e.g. Gober, 5-7, 9-11). Moreover, these contentions were rejected by the Alabama Courts (e.g. Gober, 8, 9, 11, 62, 63, 64). Finally, petitioners attempted to interrogate concerning the ordinance (Br. of Petitioners, 6, 7; Gober, 22-24; Davis, 23-25), but the evidence was excluded (Gober, 24; Davis, 25).

Respondent argues that no Motion to Exclude the Evidence is shown by the record in the case of Roosevelt Westmoreland. It is true that no Motion to Exclude is in the record of the *Westmoreland* Case, but it is clear from the Westmoreland record that such a motion was made and denied by the trial court. The judgment entry in Westmoreland states that (Westmoreland, 5):

> " . . . and the defendant files motion to exclude the evidence, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion, the defendant hereby duly and legally excepts."

Moreover, the Motion for New Trial in the *Westmoreland* Case alleges that the Court refused to grant the Motion to Exclude (Westmoreland, 8) and the Assignments of Error, Assignment 3 alleges error in refusing to grant the Motion to Exclude (Westmoreland, 32). Finally, the trial court ruled that, by stipulation, the motions in all the cases would be identical (Hutchinson, 33).

Respondent argues that the Motions to Exclude the Evidence did not contain a prayer for relief. This objection has no merit. The purpose of these motions is clear on their

face, and the Alabama Courts raised no question as to their form.

Respondent argues that the Motions to Strike and the demurrers did not specifically raise the question of the need for some identification of authority to ask Petitioners to leave the luncheon areas. This issue was, however, raised properly in the Motions to Exclude and the Motions for New Trial (e.g., Gober, 5-7) and was decided adversely to petitioners, on the merits, by the Alabama Courts (e.g., Gober, 8, 62, 63).

It is clear from the face of the records of these cases that petitioners raised constitutional questions at every opportunity in both the trial and appellate courts and that these questions were considered by the Alabama Courts and rejected on their merits. The Alabama Court of Appeals stated:

> Counsel has argued, among other matters, various phases of constitutional law, particularly as affected by the Fourteenth Amendment of the Federal Constitution, such as freedom of speech, in regard to which counsel state: "What has become known as a 'sit-in' is a different, but well understood symbol, meaningful method of communication." Counsel has also referred to cases pertaining to restrictive covenants. *We consider such principles entirely inapplicable to the present case.* (Emphasis added.) (Br. of Petitioners, 8a.)

III.

The importance of the issue: reasons why these cases should be heard here prior to disposition of other sit-in litigation.

Counting the ten convictions embraced by the instant certiorari petition, there are now pending before this Court, eleven separate certiorari petitions and jurisdictional statements dealing with state court criminal convictions growing out of the "sit-in" movement.[2]

It seems almost beyond dispute that each of these convictions poses constitutional issues of major dimension. Cf. *Garner* v. *Louisiana*, 7 L. ed. 2d 207. And their humble facts only serve to highlight the importance of the issues posed. Cf. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Thompson* v. *Louisville*, 362 U. S. 199.

But this concentration of cases poses a real problem of judicial administration. These multiple convictions merit careful review in the light of relevant constitutional princi-

---

[2] *Drews* v. *State* (Jurisdictional Statement filed 29 U. S. L. Week 3286, No. 840, 1960 term; renumbered No. 71, 1961 term); *Williams* v. *North Carolina* (Petition for Cert. filed 29 U. S. L. Week 3319, No. 915, 1960 term; renumbered No. 82, 1961 term); *Avent* v. *North Carolina* (petition for cert. filed 29 U. S. L. Week 3336, No. 943, 1960 term; renumbered No. 85, 1961 term); *Fox* v. *North Carolina* (petition for cert. filed Id. No. 944, 1960 term; renumbered No. 86, 1961 term). *Randolph* v. *Commonwealth of Virginia* (petition for cert. filed 30 U. S. L. Week 3069, No. 248, 1961 term); *Henry* v. *Commonwealth of Virginia* (petition for cert. filed 30 U. S. L. Week 3123, No. 346, 1961 term); *Lombard* v. *Louisiana* (petition for cert. filed 30 U. S. L. Week 3234, No. 638, 1961 term); *Gober* v. *City of Birmingham* (petition for cert. filed 30 U. S. L. Week 3250, No. 691, 1961 term); *Thompson* v. *Commonwealth of Virginia* (petition for cert. filed 30 U. S. L. Week 3234, No. 655, 1961 term); *Peterson* v. *City of Greenville* (petition for cert. filed 30 U. S. L. Week 3274, No. 750, 1961 term). Cf. also *Shuttlesworth and Billups* v. *City of Birmingham* (petition for cert. filed 30 U. S. L. Week 3258, No. 721, 1961 term).

ples. And yet it may be, in view of this Court's manifold responsibilities in so many realms of public adjudication, that detailed sifting of the scores of somewhat varying factual situations underlying these eleven pending applications for review cannot be forthcoming immediately. Institutional limitations counsel recognition that this Court may feel compelled to select for initial adjudication from among the pending eleven applications the one or more whose facts may best illuminate constitutional judgments of widespread application and implication. Just as "wise adjudication has its own time for ripeness", *Maryland* v. *Baltimore Radio Store, Inc.*, 338 U. S. 912, 918, so too it may flower best when rooted deep in rich factual soil.

Viewed in this light, the instant petition for certiorari presents cases which seem peculiarly apt prototypes of the entire corpus of "sit-in" litigation. Another case which presents issues in almost the same way as the instant one, and to which much of what is said here applies, is *Peterson* v. *City of Greenville*, No. 750, October Term, 1961. In the cases represented by this certiorari petition, (1) there was a municipal ordinance requiring restaurant segregation; (2) at least one of the proprietors demonstrably shaped his business practices to conform to the segregation ordinance (although inquiry into the general impact of the ordinance was foreclosed by judicial rulings below); (3) in each case the proprietor welcomed Negro patronage in the part of his establishment not covered by the ordinance; (4) in none of the cases was a defendant ordered from the store by the proprietor or his agent; (5) in none of the cases were the police summoned by the proprietor or his agent; and (6) in each of the cases the defendant was arrested for and convicted of trespass notwithstanding the non-assertion by the proprietor of whatever theoretical claims he may have had to establish a policy of excluding Negroes (a) from his premises as a whole or (b) from his restaurant

facilities (assuming there had been no segregation ordinance precluding any such discretionary business judgment on the proprietor's part).

In short, the salient facts summarized above illustrate with compelling specificity many separately identifiable (albeit integrally connected) aspects of state action enforcing racial segregation. Thus, the cases represented in this certiorari petition seem particularly apt vehicles for further judicial exploration of the problems to which this Court first addressed itself in *Garner* v. *Louisiana, supra.*

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

JACK GREENBERG
CONSTANCE BAKER MOTLEY
10 Columbus Circle
New York 19, N. Y.

ARTHUR D. SHORES
1527 Fifth Avenue, North
Birmingham, Alabama

PETER A. HALL
ORZELL BILLINGSLEY, JR.
OSCAR W. ADAMS, JR.
J. RICHMOND PEARSON
Attorneys for Petitioners

LEROY D. CLARK
MICHAEL MELTSNER
JAMES M. NABRIT, III
LOUIS H. POLLAK
of Counsel

JOHN M. BRECKENRIDGE
CITY ATTORNEY

ASSISTANT CITY ATTORNEYS
EARL MCGEE
WATTS E. DAVIS
WM. A. THOMPSON
JAMES G. ADAMS, III
WM. C. WALKER
THOMAS J. HAYDEN

February 23, 1962

Mr. Jack Greenberg
10 Columbus Circle
New York 19, New York

Re: James Gober, et al
vs. CITY OF BIRMINGHAM

Dear Mr. Greenberg:

Enclosed please find copy of Brief filed on behalf of Respondent to Petition for Writ of Certiorari.

Yours very truly,

Watts E. Davis

Watts E. Davis
Assistant City Attorney

WED:ng
Encl.
AIR MAIL

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
SEP 19 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 66

JAMES GOBER, JAMES ALBERT DAVIS, ROY HUTCHINSON, ROBERT J. KING, ROBERT PARKER, WILLIAM WEST, ROBERT D. SANDERS, ROOSEVELT WESTMORELAND, JESSIE W. ..KER, WILLIE J. WILLIS,

Petitioners,

—v.—

CITY OF BIRMINGHAM.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

BRIEF FOR PETITIONERS

CONSTANCE BAKER MOTLEY
JACK GREENBERG
10 Columbus Circle
New York 19, N. Y.

ARTHUR D. SHORES
PETER A. HALL
ORZELL BILLINGSLEY, JR.
OSCAR W. ADAMS, JR.
J. RICHMOND PEARSON
Birmingham, Alabama

Attorneys for Petitioners

LEROY CLARK
WILLIAM T. COLEMAN, JR.
MICHAEL MELTSNER
WILLIAM R. MING, JR.
JAMES M. NABRIT, III
LOUIS H. POLLAK
Of Counsel

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Questions Presented	3
Statement of the Case	4
Summary of Argument	16
ARGUMENT	
I. Alabama's Judgments in These Cases Are Inconsistent With the Constitutional Mandate of Equal Protection	18
A. Petitioners' Convictions Were Decreed by Birmingham's Restaurant Segregation Ordinance	18
B. Petitioners' Convictions Were Decreed by a Massive State Segregation Policy	23
C. State Enforcement of Private Racial Discrimination Is Likewise Proscribed by the Fourteenth Amendment	25
D. No Essential Property Right of the Department Store Is Infringed Here	29
E. The State May Not Arrest and Convict Petitioners for Having Violated the State's Segregation Policy in Premises in Which the State Is Deeply Involved Through Its Licensing and Regulatory Powers	37

PAGE

F. These Convictions Must Be Reversed Since, in Addition to the Foregoing, Alabama Has Failed to Protect Petitioners' Rights to Equal Access to Public Accommodations 39

II. The Decision Below Conflicts With Decisions of This Court Securing the Right of Freedom of Expression Under the Fourteenth Amendment to the Constitution of the United States 44

A. The Enforcement of the State and City Segregation Policy and the Interference of the Police Violated Petitioners' Right to Freedom of Expression 44

B. The Convictions Deny Petitioners' Right to Freedom of Expression in That They Rest on a Statute Which Fails to Require Proof That Petitioners Were Requested to Leave by a Person Who Had Established Authority to Issue Such a Request at the Time Given 48

Conclusion 51

Table of Cases

Abrams v. United States, 250 U. S. 616 30
Apex Hosiery Co. v. Leader, 310 U. S. 469 (1940) 32

Bailey v. Patterson, 369 U. S. 31 18
Baker v. Carr, 369 U. S. 186 37
Baldwin v. Morgan, 251 F. 2d 780 (5th Cir. 1958) 23
Barrows v. Jackson, 346 U. S. 249 .... 18, 32
Betts v. Easley, 161 Kans. 459, 169 P. 2d 831 39

PAGE

Bob-Lo Excursion Co. v. Michigan, 333 U. S. 28 30
Boman v. Birmingham Transit Co., 280 F. 2d 531 (5th Cir. 1960) 23
Boynton v. Virginia, 364 U. S. 454 18
Breard v. Alexandria, 341 U. S. 622 ..... 28, 45
Browder v. Gayle, 142 F. Supp. 707, aff'd 352 U. S. 903 24
Brown v. Board of Education, 347 U. S. 483 18
Buchanan v. Warley, 245 U. S. 60 18
Burstyn v. Wilson, 343 U. S. 495 49
Burton v. Wilmington Parking Authority, 365 U. S. 715 ..... 16, 18, 39, 40, 43

In Re Carple's Estate, 140 Misc. 459, 250 N. Y. S. 680 (Surr. Ct. 1931) 32
Catlette v. United States, 132 F. 2d 902 (4th Cir. 1943) 40
Central Iron Co. v. Wright, 20 Ala. App. 82, 101 So. 815 50
Chaplinsky v. New Hampshire, 315 U. S. 568 49
Civil Rights Cases, 109 U. S. 3 ..... 16, 39, 40, 42
Connally v. General Construction Co., 269 U. S. 385 49
Cooper v. Aaron, 358 U. S. 1 ..... 18, 47
Cruger v. Phelps, 21 Misc. 252, 47 N. Y. S. 61 (Sup. Ct. 1897) 31

D'Arcangelo v. D'Arcangelo, 137 N. J. Eq. 63, 43 A. 2d 169 (Ch. 1945) 32
Davidson v. Wilmington Trust Co., 23 Del. Ch. 1, 2 A. 2d 285 (Ch. 1938) 31
Davis v. Schnell, 81 F. Supp. 872 (S. D. Ala. 1949) aff'd 336 U. S. 933 18
District of Columbia v. John R. Thompson Co., 346 U. S. 100 30

PAGE

Dwyer v. Kuehler, 116 N. J. Eq. 426, 174 Atl. 154 (Ch. 1934) 31

Fay v. New York, 332 U. S. 261 27
In Re Forte's Will, 149 Misc. 329, 267 N. Y. S. 603 (Surr. Ct. 1933) 32
Freeman v. Retail Clerks Union, Washington Superior Court, 45 Lab. Rel. Ref. Man. 2334 (1959) 47

Garner v. Louisiana, 368 U. S. 157 ..... 27, 44, 45, 50
Gilbert v. Minnesota, 254 U. S. 325 29
Green v. State, 58 Ala. 190 24

In Re Haight's Will, 51 App. Div. 310, 64 N. Y. S. 1029 (2d Dept. 1900) 31
Hawke v. Euyart, 30 Neb. 149, 46 N. W. 422 (1890) 31
Henneford v. Silas Mason Co., 300 U. S. 577 31
Holmes v. Atlanta, 350 U. S. 879 18
Holmes v. Connecticut Trust & Safe Deposit Co., 92 Conn. 507, 103 Atl. 640 (1918) 32
Hudson County Water Co. v. McCarter, 209 U. S. 345 36

Klor's Inc. v. Broadway-Hale Stores, 359 U. S. 207 (1959) 33
Kovacs v. Cooper, 336 U. S. 77 28

Lambert v. California, 355 U. S. 255 49
Lane v. Cotton, 1 Ld. Raym. 646, 1 Salk. 18, 12 Mod. 472 34
Lanzetta v. New Jersey, 306 U. S. 451 49
Levitt & Sons, Inc. v. Division Against Discrimination, 31 N. J. 514, 158 A. 2d 177 (1960) 33
Lorain Journal Co. v. United States, 342 U. S. 143 (1951) 33
Lynch v. United States, 189 F. 2d 476 (5th Cir. 1951) 40

PAGE

Maddox v. Maddox, Admr., 52 Va. 804 (1954) 31
McCord v. State, 79 Ala. 269 50
Mapp v. Ohio, 367 U. S. 643 29
Marsh v. Alabama, 326 U. S. 501 ..... 16, 30, 36, 46
Martin v. Struthers, 319 U. S. 141 ..... 28, 45
Massachusetts Comm'n Against Discrimination v. Colangelo, 30 U. S. L. W. 2608 (Mass. 1962) 33
Miller v. Schoene, 276 U. S. 272 (1928) 35
Monk v. City of Birmingham, 87 F. Supp. 538 (N. D. Ala. 1949), aff'd 185 F. 2d 859, cert. den. 341 U. S. 940 23
Monroe v. Pape, 365 U. S. 167 26
Morrissette v. U. S., 342 U. S. 246 ..... 49, 50

NAACP v. Alabama, 357 U. S. 449 45
N. Y. State Comm'n Against Discrimination v. Pelham Hall Apts., Inc., 10 Misc. 2d 334, 170 N. Y. S. 2d 750 (Sup. Ct. 1958) 33
Nixon v. Condon, 286 U. S. 73 39
N. L. R. B. v. American Pearl Button Co., 149 F. 2d 258 (8th Cir. 1945) 46
N. L. R. B. v. Babcock & Wilcox Co., 351 U. S. 105 (1955) 35
N. L. R. B. v. Fansteel Metal Corp., 306 U. S. 240 46

People v. Barisi, 193 Misc. 934, 86 N. Y. S. 2d 279 (1948) 47
Porter v. Barrett, 233 Mich. 373, 206 N. W. 532 (1925) 32
Public Utilities Commission v. Pollak, 343 U. S. 451 ..... 29, 39

Queenside Hills Realty Co. v. Saxl, 328 U. S. 80 (1946) 35

Railway Mail Ass'n v. Corsi, 326 U. S. 88 30
In Re Ranney's Estate, 161 Misc. 626, 292 N. Y. S. 476 (Surr. Ct. 1936) 32

PAGE

Republic Aviation Corp. v. N. L. R. B., 324 U. S. 793 (1945) 30, 35, 46

Saia v. New York, 334 U. S. 558 49
St. Louis Poster Advertising Co. v. St. Louis, 249 U. S. 269 (1919) 35
San Diego Bldg. Trades Council v. Garmon, 349 U. S. 236 46
Schenck v. United States, 249 U. S. 47 47
Schmidinger v. Chicago, 226 U. S. 578 35
Screws v. United States, 325 U. S. 91 26
Sellers v. Johnson, 163 F. 2d 877 (8th Cir. 1947), cert. denied 332 U. S. 851 47
Semler v. Oregon State Board of Dental Examiners, 294 U. S. 608 (1935) 35
Shelley v. Kraemer, 334 U. S. 1 ..... 16, 18, 25, 28, 30, 32, 36, 37
Shuttlesworth v. Board of Education, 162 F. Supp. 372 (N. D. Ala. 58 aff'd 358 U. S. 101) 24
Shuttleworth v. Gaylord, 202 F. Supp. 59 (N. D. Ala. 1961) 23
State Athletic Comm'n v. Dorsey, 359 U. S. 533 18
State of Maryland v. Williams, Baltimore City Court, 44 Lab. Rel. Ref. Man. 2357, 2361 (1959) 47
Steel v. Louisville and Nashville R. R. Co. 323 U. S. 192 39
Stromberg v. California, 283 U. S. 359 44

Taylor v. Louisiana, 370 U. S. 154 26
Terminiello v. Chicago, 337 U. S. 1 47
Terry v. Adams, 345 U. S. 461 40
Thomas Cusack Co. v. Chicago, 242 U. S. 526 (1917) 35
Thompson v. City of Louisville, 362 U. S. 199 50
Thornhill v. Alabama, 310 U. S. 88 ..... 44, 46

PAGE

Truax v. Corrigan, 257 U. S. 312 40
Turner v. Memphis, 369 U. S. 350 ..... 16, 18

United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898) aff'd 175 U. S. 211 (1899) 33
United States v. Beaty, 288 F. 2d 653 (6th Cir. 1961) 35
United States v. Colgate, 250 U. S. 300 (1919) 33
United States v. Hall, 26 Fed. Cas. 79 40
U. S. v. Parke, Davis & Co., 362 U. S. 29 (1960) 33
United Steelworkers v. N. L. R. B. 342 F. 2d 593 (D. C. Cir. 1956), reversed on other grounds, 357 U. S. 257 46

Watchtower Bible and Tract Soc. v. Metropolitan Life Ins. Co., 297 N. Y. 339, 79 N. E. 2d 433 (1948) 28
Western Turf Assn. v. Greenberg, 204 U. S. 359 30
West Virginia State Board of Education v. Barnette, 319 U. S. 624 44
Winterland v. Winterland, 389 Ill. 384, 59 N. E. 2d 661 (1945) 31
Winters v. New York, 333 U. S. 507 49
Wolf v. Colorado, 338 U. S. 25 29

FEDERAL STATUTES

Civil Rights Act of 1866, 14 Stat. 27 28
Civil Rights Act of 1875 41
Civil Rights Act of 1875, 18 Stat. 335 28
Clayton Act, 15 U. S. C. §12 et seq. 33

Enforcement Act of May 31st, 1870, 16 Stat. 140 41
Enforcement Act of April 20, 1871, 17 Stat. 13 41

Miller-Tydings Act Amendment of §1 of the Sherman Act, 15 U. S. C. §1 32

PAGE

Robinson-Patman Act, 15 U. S. C. §13 et seq. 33

Sherman Anti-Trust Act, 15 U. S. C. §1 et seq. 33

28 U. S. C. 1257(3) 2
42 U. S. C. 1981 27
42 U. S. C. 1982 27
42 U. S. C. 1983 27

STATE STATUTES

Alabama Constitution, Art. 14, §256 24

Cal. Civil Code, §51 33
Cal. Civ. Code, sections 51-52 (Supp. 1960) 34
Cal. Health & Safety Code §35740 33
Code of Alabama, Recompiled 1958, Title 7, §429(1) 6, 23
Code of Alabama, Recompiled 1958, Title 10, §§1 to 263 37
Code of Alabama, Recompiled 1958, Title 14-360 24
Code of Alabama, Recompiled 1958, Title 44-10 24
Code of Alabama, Recompiled 1958, Title 45-4 24
Code of Alabama, Recompiled 1958, Title 45-52 24
Code of Alabama, Recompiled 1958, Title 45-248 24
Code of Alabama, Recompiled 1958, Title 48-186 24
Code of Alabama, Recompiled 1958, Title 48-196-198 24
Code of Alabama, Recompiled 1958, Title 48-301 (31a) to (31c) 24
Code of Alabama, Recompiled 1958, Title 51-244 24
Code of Alabama, Recompiled 1958, Title 52-613(1) 24
Code of Alabama, Recompiled 1958, Title 121-3 24
Colo. Rev. Stat. Ann. sections 25—1—1 (1953) 34
Colo. Rev. Stat. Ann. §§69-7-1 to 69-7-7 (Supp. 1960) 33
Conn. Gen. Stat. Rev. §53-35 (Supp. 1960) 33
Conn. Gen. Stat. Rev. §53-35 (Supp. 1961) 34

PAGE

D. C. Code Ann. sections 47-2901 et seq. (Supp. 1960) ... 34

Indiana Ann. Stat. sections 10—901-02 (Supp. 1962) ... 34
Iowa Code Ann. sections 735.1 (1950) ... 34

Kansas Gen. Stat. Ann. section 21-2424 (1949) ... 34

Mass. G. L. c. 151B, §§1, 4, 6 (Supp. 1961) ... 33
Mass. G. L. c. 151B, §§1-10 (Supp. 1961), as amended by Stat., 1961, cc. 128, 570 ... 33
Mass. Gen. L. c. 272, §§92A, 98 (1956) ... 34
Mich. Stat. Ann. §28.343 (Supp. 1959) ... 34
Minn. Stat. Ann. section 327.09 (1947) ... 34
Minn. Stat. Ann. §§363.01-.13, as amended by L. 1961, c. 428 to become effective 12/31/62 ... 33
Montana Rev. Codes Ann. section 64-211 (Supp. 1961). 34

Neb. Rev. Stat. sections 20—101—102 (1943) ... 34
N. D. Cent. Code, section 12-22-30 (Supp. 1961) ... 34
N. H. Rev. Stat. Ann. §354:1 (Supp. 1961) ... 33, 34
N. J. Stat. Ann. §§10:1-2 to 10:1-7 (1960) ... 34
N. J. Stat. Ann. §18:25-4 (Supp. 1961) ... 33
N. M. Stat. Ann. sections 49—8—1-6 (Supp. 1961) ... 34
N. Y. Civil Rights Law §40 (1948); Executive Law. §§292(9), 296(2) (Supp. 1962) ... 34
N. Y. Executive Law, §290 (Supp. 1962). ... 33

Ohio Rev. Code §4112.02(G) (Supp. 1961) ... 34
Ore. Rev. Stat. sections 30.670-.680, as amended by L. 1961 c. 247 ... 34
Ore. Rev. Stat. §659.033 (1959) ... 33

Pa. Stat. Ann. Tit. 18, section 4654, as amended by Act No. 19 of the 1961 Session of Pa. Gen. Assembly 34
Pa. Stat. Ann. Titl. 43, §§951-63, as amended by Acts 1961, No. 19 ... 33

R. I. Gen. Laws Ann. sections 11—24—1-6 (1956) ... 34

PAGE

Vermont Stat. Ann. Tit. 13, sections 1451-52 (1958) 34

Wash. Rev. Code §49.60.030 (1957) 33
Wash. Rev. Code, section 49.60.040 (1957) 33
Wash. Rev. Code, section 49.60.040 (1962) 34
Wash. Rev. Code, section 49.60.215 (1962) 34
Wis. Stat. Ann. section 942.04 (1958), as amended (Supp. 1962) 34
Wyo. Stat. §§6-83.1, 6-83.2 (Supp. 1961) 34

CITY ORDINANCES

City Code of Birmingham, Alabama, Section 369 (1944) 2, 18, 23
City Code of Birmingham, Alabama, Section 1436 (1944) 2, 4, 25
City Code of Birmingham, Alabama, Section 5288 (1930) 3

General City Code Birmingham (1944), Ch. 14 37
General City Code Birmingham (1944) §§348 and 376(a) 37

OTHER AUTHORITIES

Abernathy, Expansion of the State Action Concept Under the Fourteenth Amendment, 43 Cornell L. Q. 375 43
Adler, Business Jurisprudence, 28 Harv. L. Rev. 135 (1914) 34
A. L. I., Restatement of Property, §424 (1944) 31
A. L. I., Restatement of the Law of Property, Div. 4, Social Restrictions Imposed Upon The Creation Of Property Interests (1944), p. 2121 32
A. L. I., Restatement of Torts, §867 (1939) 29

PAGE

Beale, The Law of Innkeepers and Hotels (1906) 34
4 Blackstone's Commentaries, Ch. 13, Sec. 5(6) Wendell's Ed. 1850 29
Blodgett, Comparative Economic Systems, 24 (1944) 31
Browder, Illegal Conditions and Limitations: Miscellaneous Provisions, 1 Okla. L. Rev. 237 (1948) 32
Cong. Globe, 41st Cong. 2d Sess., p. 3611 (1870) 40
Cong. Globe, 42d Congress, 1st Sess., p. 459 42
Cong. Globe, 42nd Congress, 1st Sess., p. 483 (1871) 41
Cong. Globe, 42d Cong., 2d Sess., 382-383 (1872) 29
Appendix to the Cong. Globe, 42d Congress, 1st Sess., p. 85 42
Cong. Rec., p. 412, 43d Cong., 1st Sess. (1874) 41

ENGLISH STATUTE

Statute of Labourers, 25 Ed. III, Stat. I, (1350) 34

OTHER AUTHORITIES

Gray, Restraints on the Alienation of Property, 2d ed. 1895, §259 32
Gray, The Rule Against Perpetuities, §201, 4th ed., 1942 32
Hale, Force and the State: A Comparison of "Political" and "Economic" Compulsion, 35 Colum. L. Rev. 149 (1935) 43
Konvitz & Leskes, A Century of Civil Rights, 150 (1961) 30, 43
Leach, Perpetuities in a Nutshell, 51 Harv. L. Rev. 638 (1938) 32

PAGE

Mund, "The Right to Buy—And Its Denial to Small Business," Senate Document #32, 85th Cong. 1st Sess., Select Committee on Small Business (1957) 34

Pollak, Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler, 108 U. Pa. L. Rev. 1 (1959) 43

Powell, Real Property, ¶¶759-827 32

6 Powell, Real Property ¶851, Restatement of Property 31

6 Powell, Real Property ¶858 at 64 32

Rankin, The Parke, Davis, Case, 1961 Antitrust Law Symposium, New York State Bar Association Section on Antitrust Law 63 (1961) 33

Sayre, Public Welfare Offenses, 33 Columbia L. Rev. 55 (1933) 49

Southern School News, August 1960, Vol. 9, No. 2, p. 1.... 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 66

JAMES GOBER, JAMES ALBERT DAVIS, ROY HUTCHINSON, ROBERT J. KING, ROBERT PARKER, WILLIAM WEST, ROBERT D. SANDERS, ROOSEVELT WESTMORELAND, JESSIE WALKER, WILLIE J. WILLIS,

Petitioners,

—v.—

CITY OF BIRMINGHAM.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

BRIEF FOR PETITIONERS

Opinions Below

The opinions of the Court of Appeals of Alabama are reported at 133 So. 2d 697 (Gober, R. 58); 133 So. 2d 703 (Davis, R. 88); 133 So. 2d 703 (Hutchinson, R. 124); 133 So. 2d 704 (King, R. 144); 133 So. 2d 705 (Parker, R. 118); 133 So. 2d 705 (Sanders, R. 220); 133 So. 2d 706 (Walker, R. 262); 133 So. 2d 707 (West, R. 194); 133 So. 2d 707 (Westmoreland, R. 236); 133 So. 2d 708 (Willis, R. 278).

Jurisdiction

The judgments of the Alabama Court of Appeals were entered on May 30, 1961 (Gober 64, Davis 88, Hutchinson 124, King 144, Parker 178, West 194, Sanders 220, West-

moreland 236, Walker 262, Willis 278). Petitions to the Supreme Court of Alabama for Writs of Certiorari were denied on September 14, 1961 (Gober 69, Davis 92, Hutchinson 128, King 144, Parker 182, West 194, Sanders 224, Westmoreland 236, Walker 266, Willis 278).

Applications to the Supreme Court of Alabama for rehearing were overruled on November 2, 1961 (Gober 71, Davis 92, Hutchinson 128, King 144, Parker 182, West 194, Sanders 224, Westmoreland 236, Walker 266, Willis 278).

The jurisdiction of this Court is invoked pursuant to United States Code Title 28, Section 1257 (3), petitioners having asserted below, and asserting here, the deprivation of their rights, privileges, and immunities secured by the Constitution of the United States.

Constitutional and Statutory Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves the following sections of the City Code of Birmingham, Alabama:

> "Section 1436 (1944), *After Warning.* Any person who enters into the dwelling house, or goes or remains on the premises of another, after being warned not to do so, shall on conviction, be punished as provided in Section 4, provided, that this Section shall not apply to police officers in the discharge of official duties.
>
> Section 369 (1944), *Separation of races.* It shall be unlawful to conduct a restaurant or other place for the serving of food in the city, at which white and colored people are served in the same room, unless such white and colored persons are effectually separated by a solid partition extending from the floor upward to a distance

of seven feet or higher, and unless a separate entrance from the street is provided for each compartment" (1930, Section 5288).

Questions Presented

Petitioners have been arrested, convicted, and sentenced to prison for refusal to obey the request to leave a lunch counter in a department store open to the public, including Negroes. This request was predicated on a city ordinance requiring racial segregation in eating facilities buttressed by a massive state policy of segregation. The premises are extensively licensed and regulated by the City and State. And, Alabama has failed to accord Negroes the right of equal access to public accommodations.

I.

A. May these state court convictions stand consistently with the Fourteenth Amendment in view of the fact that the segregation which gave rise to them was based upon a city ordinance requiring racial segregation in eating facilities buttressed by a massive state policy of racial segregation?

B. May these convictions stand consistent with the equal protection clause of the Fourteenth Amendment as enforcement of the private determination of department stores to exclude Negroes from certain eating facilities?

C. In addition to the foregoing considerations, is not the property right which Alabama sought to protect here—the right to discriminate racially in a single portion of a store open to the general public—so inconsequential to the main core of the store's proprietary interests that the state may not, compatibly with the Fourteenth Amendment, enforce that right by its criminal laws?

D. Is not the degree of supervision and control which the City and the State exercise over the department store lunch counters here, given the circumstances set forth above, so extensive a form of state involvement that the State has an obligation to afford equal protection?

E. In view of the fact that Alabama denies protection to Negroes against racial discrimination in public accommodations, do not the circumstances set forth above establish a denial of equal protection of the laws?

II.

A. Has Alabama denied petitioners freedom of speech secured by the Fourteenth Amendment by using its criminal trespass laws as a device to stop petitioners from persuading the department stores in Birmingham to abandon their policies of discrimination at the lunch counters?

B. Is not freedom of speech impaired by failure to construe the statute under which conviction was obtained to require notice that the request to leave the premises was given by one who had established authority to issue such request at the time given?

Statement of the Case

Petitioners, ten Negro students, were all tried seriatim in groups of two and simultaneously convicted on October 10, 1960 following sit-in demonstrations at department store lunch counters serving white customers only, in Birmingham, Alabama (R. 9, 81, 100, 136, 15[illegible], 1[illegible]7, 202, 229, 244, 271). Each petitioner was charged with having violated §1436, General City Code of Birmingham, 1944, which provides as follows:

> "Any person who enters into the dwelling house, or goes or remains on the premises of another, after being

warned not to do so, shall on conviction, be punished as provided in Section 4, provided, that this Section shall not apply to police officers in the discharge of official duties." (R. 2, 73, 93, 129, 145, 183, 195, 225, 237, 267).

Originally tried and convicted in Birmingham's Recorder's Court, petitioners' appeals and trials *de novo* in the Circuit Court, Tenth Judicial Circuit of Alabama, ended in new convictions and fines of $100 each and 30 days in jail. Simultaneous appeals were taken to the Court of Appeals of Alabama where the convictions were affirmed (R. 57, 88, 124, 144, 178, 194, 220, 236, 262, 278) followed by denials of petitions for writs of certiorari in the Supreme Court of Alabama (R. 65, 92, 128, 144, 182, 194, 224, 236, 266, 278). A single petition for writ of certiorari was filed in this Court and granted on June 25, 1962 (R. 279). (Stipulations as to printing of record R. 279.)

Petitioners claimed that their convictions deprived them of due process and equal protection guaranteed by the Fourteenth Amendment to the Federal Constitution. These constitutional claims were first raised by motions to strike the complaint (R. 3, 74, 94, 130, 146, 184, 196, 226, 238, 268); demurrers (R. 4, 75, 95, 131, 147, 185, 197, 227, 239, 269); motions to exclude the testimony (R. 6, 77, 97, 133, 148, 187, 199, 229, 241, 271); motions for new trial (R. 12, 83, 103, 139, 154; 189, 205, 231, 247, 273); assignment of errors (R. 56, 87, 123, 142, 177, 192, 219, 234, 276) and in the petitions for writs of certiorari in the Supreme Court of Alabama (R. 66, 89, 125, 144, 179, 194, 221, 236, 263, 278).

On appeal to the Court of Appeals a decision was rendered in the first case, *Gober*, on the basis of which all other convictions were affirmed (R. 58-64, 88, 124, 144, 178, 194, 220, 236, 262, 278). That court upheld the overruling of Gober's motion to strike the complaint on the ground that it

was not a proper method of testing the sufficiency of the complaint (R. 59-60) and the overruling of grounds 1, 2, 3 and 4 of the demurrer on the ground that these were too general in nature and did not point out any specific defect in the complaint (R. 60).

All of the constitutional grounds urged in the demurrer were rejected on the ground that "no constitutional application of the ordinance . . . appears from any of the pleadings. Such unconstitutional application would be a matter of evidence. These grounds, setting up a speaking demurrer, necessitated an overruling of the demurrer in this aspect" (R. 61). The trial court's denials of the motion to exclude the evidence and for a new trial were also affirmed (R. 61). Gober's free speech and equal protection claims were held "entirely inapplicable" (R. 61).

Although petitioners' counsel on the trial brought out the existence of an ordinance requiring segregation in restaurants in Birmingham (R. 24-26), the court ruled that there was no question raised in the record, by the pleadings, of any ordinances requiring segregation in restaurants (R. 63). However, ordinances of the City of Birmingham are judicially noticeable in Alabama (7 Code of Alabama, §429 (1)). The court then concluded that since the department store involved was a private enterprise, petitioner entered as a licensee whose license was destroyed when petitioner was requested to leave the restaurant by an official and refused, making him a trespasser (R. 63-64). The court also ruled that since the store owned the premises which petitioner refused to leave, the store had "a full right to limit the use of its own premises as it saw fit" (R. 63), a right which the Alabama Court of Appeals regarded as inviolate saying: "The right to operate a restaurant on its own premises under such conditions as it saw fit to impose was

an inalienable property right possessed by the Pizitz store" (R. 63).

All of the petitioners were arrested on March 31, 1960. The facts developed on each of the five trials follows:

Gober and Davis

Petitioners Gober and Davis were arrested in Pizitz's Department Store by a police officer who had gone there in response to a report of a "disturbance" or "commotion" (R. 18). On direct examination by the City's attorney the officer was asked:

> "Q. When you got to the dining or eating area what did you find that was unusual or out of the ordinary? A. Well, I found that the cafeteria part was closed to all customers and I found two Negro males sitting in the eating part of the cafeteria" (R. 18).

When asked what they were doing the officer responded, "They were sitting there just talking to one another" (R. 19). No one said anything to either petitioner in the presence of the arresting officer (R. 19); and the officer did not speak to any personnel connected with the store in the presence of petitioners (R. 19). The report pursuant to which the officer acted came from his superior (R. 19-20). No member of the store requested the officer to arrest petitioners (R. 20).

In addition to the arresting officer, the controller of the store testified that he did not make any remark to petitioners (R. 21, 23) although an assistant to the president asked petitioners to leave the tea room area (R. 23). The president's assistant told petitioners they could be served in the Negro restaurant in the basement (R. 23). "He (the assistant to the president) told them it would be against the law to serve them there" (R. 24). At this point peti-

tioners' counsel developed the fact that there is an ordinance of the City of Birmingham requiring racial segregation in eating facilities (R. 24-25). The controller was then asked: "Q. Did you or any official at Pizitz's call the police? A. No sir" (R. 26). Once again he was asked: "Q. So far as you know, no official at Pizitz's had filed a complaint with the Police Department at that time? A. That is right" (R. 27).

Petitioner Davis, a student at Daniel Payne College (R. 28), testified that on the day in question he made purchases at Pizitz's and then attempted to obtain service in the lunch area (R. 43-44). The waitresses never came (R. 44). Davis and his companion, Gober (R. 50), were told by some unidentified person that they could be served in a place reserved for Negroes (R. 44-45). The lunch area was located on the mezzanine (R. 44). No sign indicated a racial restriction as to service (R. 44). Petitioners were not asked to leave the store or the place where they were sitting (R. 44). On cross-examination, it was established that petitioner Davis had gone to Reverend Shuttlesworth's house to be advised on March 30, 1960. Petitioner Gober was also there, as well as petitioners Hutchinson, King, Parker, Sanders, Walker, West, Westmoreland and Willis (R. 46-48).

> Q. You went there voluntarily? A. That is right.
>
> Q. Nobody solicited you to come there? A. That is right.
>
> Q. Nobody came to Daniel Payne College and asked for volunteers to go to the meeting? A. That is right.
>
> Q. How did you know about the meeting? A. We went there for advice. We went to his home.
>
> Q. Who did you go there with? A. Reverend Billups was on the campus and I asked him to take us over there if he was going to town and he did so (R. 47).

Hutchinson and King

Petitioners Hutchinson and King were arrested when they were sitting alone at a table in the dining area of Loveman's Department Store (R. 107-108). The arresting officer, Martin, was directed to go to Loveman's by another officer, Holt (R. 107). When Officer Martin arrived, he saw a rope from one post to another going up to the mezzanine or eating place with a sign marked closed (R. 107). There were no signs limiting the use of the facility to whites or Negroes (R. 108). There was no conversation with petitioners other than to tell them they were under arrest (R. 107). There was no disorder (R. 109) and no person connected with the store personally informed Martin that petitioners had been directed to leave (R. 108).

The concessionaire in charge of the food department who observed petitioners in the dining area on the day of their arrest had had no conversation with them (R. 109-110) but heard Mr. Kidd of the store's Protection Department tell petitioners to leave in the following manner: "He announced in general terms that the tea room was closed and for everyone to leave" (R. 110). According to this witness, petitioners remained seated along with other persons, who were white, until the police arrived. Lt. Pierce approached and asked him if he was the manager and said someone had called the police and had told them that there were "two people" in Loveman's "trying to be served," and he asked, "Where are they?" Mr. Schmid, the concessionaire, was asked whether there was any disturbance. His reply was, "It naturally is you know in this case" (R. 112). However, he did not call the police and he didn't know who called (R. 112). The waiters left the floor when petitioners seated themselves (R. 112). And when the officer came, the concessionaire left the floor (R. 113). About 25 white customers were still eating when the police arrived (R. 113). The store

detective, D. V. Kidd, announced to the whites seated on the mezzanine in the presence of petitioners that the store was being closed but did not speak directly to petitioners (R. 115). The officer did not arrest petitioners in his presence (R. 115). Mr. Kidd testified that in closing the food service the store manager hung up a sign saying closed (R. 117), but he (Kidd) did not see petitioners until the crowd dispersed, the milling crowd being the cause for closing (R. 117). He, too, admitted that no one connected with Loveman's Department Store called police (R. 118). He did not tell the officer anything other than the fact that people were milling around and he "found the two colored boys sitting there and we had closed the tea area" (R. 118).

The detective testified that there was a place on the 7th floor where Negroes may be served (R. 119); however, the policy of Loveman's regarding service of Negroes at the lunch tables was not known to this witness. He testified, ". . . . the policy of the store I do not know, I have never been informed in regard to that although on all of the occasions I visited the mezzanine I have never seen any colored eating on the mezzanine" (R. 121). The detective did not sign a complaint or affidavit for the arrest of these petitioners (R. 121-122).

On the other hand, the concessionaire testified that Loveman's has no separate accommodations for Negroes (R. 113). The two eating facilities, one in the basement and one in the mezzanine, are for white customers only (R. 113-114). Negroes are permitted to trade in the store which sells household goods, furnishings, notions, etc. (R. 114).

Parker and West

Petitioners Parker and West were arrested in Newberry's Department Store. Officer B. R. Myers arrived about 10:30 A. M. and saw "two colored males" seated at the lunch counter. He had no conversation with them or any store

official (R. 158-159). Petitioners had no conversation with any employees of Newberry's in the presence of the officer (R. 159). The officer arrested petitioners on the strength of a call which had been received from police headquarters to go to Newberry's (R. 159). The arresting officer understood that the complaint regarding petitioners' presence in Newberry's had been received by officer Stoddard from a man named Stallings of the department store (R. 160-161).

The store detective in Newberry's, Mrs. L. B. Gibbs, testified that she told petitioners West and Parker to leave (R. 162) and to go to the snack bar for colored on the 4th floor, but, "They said they were not leaving, that they were not violating any law" (R. 163). Newberry's has three lunch counters, one on the first floor and one in the basement for white customers only and one on the fourth floor for Negroes (R. 163). Lloyd L. Stallings, Assistant Store Manager, testified that he was called from his office by "someone" who said "there was a lot of confusion at the lunch counter" and would he come down. When he got down to the main floor he saw two colored men seated there (R. 164). He addressed petitioners as follows: "You know you can't do this . . . we have a lunch counter up on the fourth floor for colored people only. We would appreciate it if you would go up there" (R. 164). In reply defendants said, "We have our rights." Mr. Stallings testified, however, that he did not call the police and doesn't know who did (R. 165). Even after the police arrived he made no complaint to them or subsequently and to his knowledge no one else connected with the store did either (R. 165).

Newberry's is a national chain store engaged in selling goods to the public (R. 165). Although the fourth floor lunch counter has a sign saying for colored only, the one on the first floor has no sign limiting service on racial grounds (R. 166). Negroes and whites, of course, shop at other depart-

ments on the first floor where this lunch counter is located (R. 166). When petitioners' counsel tried to develop the fact that Newberry's policy concerning Negroes is dependent upon the custom of the community, this testimony was ruled incompetent by the court and exception taken (R. 167-168).

Petitioner West testified that he met petitioner Parker on the date in question, made a couple of purchases and then invited Parker to go with him and have something to eat. They went to the lunch counter on the first floor. Other white persons were seated at the counter (R. 171). The waitress never came over to take their order and no one invited them to leave (R. 171). The arresting officer ordered the white people dining at the counter to get up. All of them did not leave (R. 172). Petitioner West then got up to leave and the arresting officer grabbed him from behind. He told petitioners they were under arrest but did not say what for (R. 172-173). This petitioner testified that he had expected to get service because he had been served at other counters without difficulty (R. 173).

Sanders and Westmoreland

Petitioners Sanders and Westmoreland were arrested as they sat alone in the basement lunchroom of Kress's 5 & 10¢ store (R. 208-209). Officer Caldwell arrived pursuant to a call from police headquarters (R. 208-209). The officer testified that the manager told him in the presence of petitioners that petitioners could not be served where they were seated and then turned out the lights and closed the counter (R. 209). Thereupon this officer arrested petitioners although the manager did not request the arrest or tell petitioners to leave the counter (R. 209-210). The lunch counter manager testified that he approached petitioners and told them they could not be served there and put up a closed sign. Petitioners were sitting at a counter in

one bay or section thereof when the manager turned off the lights. Petitioners then moved to another bay and the lights were turned off there (R. 211-212). One youth said, "We have our rights." The lunch counter manager then called the manager of the store. The store manager asked petitioners to leave but petitioners did not answer (R. 212). The police arrived as both managers turned away from the petitioners. It was intended only that petitioners leave the area, not the store (R. 213). Everyone left the counter when it was closed except an elderly woman who finished her sandwich. She remained after police arrived but was not arrested (R. 217). The lunch counter manager did not himself call the police, did not ask them to arrest petitioners, and did not sign an affidavit (R. 213).

Kress is also a department store selling to the general public (R. 214). No facilities are provided for colored customers (R. 215). Lunch counters at Kress are for customers who come into the store (R. 215). Negroes are served food at the lunch counters to carry out (R. 218), and buy equally and without discrimination at all other counters (R. 216).

Walker and Willis

Petitioners Walker and Willis were arrested in Woolworth's. The lunch counter there was on the first floor. The arresting officer, Richard Casey, testified that when he arrived the lights were turned out over the counter and Mrs. Evans, the manager was waiting for him (R. 251); that petitioners were seated at the counter. He had no conversation with them (R. 252) although Mrs. Evans told him that she had asked petitioners to leave, that the place was closed; that she then told petitioners the counter was closed, that they would have to leave (R. 252-253); and that there was no one else seated at the lunch counter at that

point (R. 253). The officer admitted that Mrs. Evans did not instruct him to arrest petitioners and no one else connected with the store did either (R. 253).

Petitioner Walker testified, on the other hand, that on the date in question he went to Woolworth's to purchase handkerchiefs and a birthday gift for a friend. He met petitioner Willis there who also made purchases (R. 255). They then went to the lunch counter but did not get a chance to order anything. They were refused service by the first waitress and just sat there until the police arrived (R. 256). He never saw the store manager, Mrs. Evans, until his trial in the Recorder's Court (R. 256). He was never asked to leave by anyone connected with the store. When the police arrived they requested the white customers seated at the counter to leave. A white man sitting next to petitioners refused to move, but the police required him to do so, although he was not arrested (R. 256). Petitioner Walker also testified that he saw officer Casey for the first time when he was taken outside of the store to the patrol car and that Casey was not the officer who had taken them out of the store. The counter contained no sign limiting service to "white or colored" (R. 257).

Facts Common to Each Case

The following significant facts appear in each of these cases:

1. The protest demonstration in each case took place in a department store where petitioners and all other members of the public were invited to trade, and did, at all counters except the lunch counter in question (Gober and Davis, R. 43-44, 50; Hutchinson and Davis 114, 119-120; Parker and West 165-166, 169, 170; Sanders and Westmoreland 214-216, 218; Walker and Willis 255-256, 257-258).

2. All of these petitioners sought to purchase food in an area of the premises where any member of the white public could make this purchase and where there was no sign limiting this purchase to white customers (Gober and Davis, R. 44-50; Hutchinson and King 108, 113; Parker and West 163, 166, 171; Sanders and Westmoreland 216, 218; Walker and Willis 257).

3. In each case it appears that the police arrived at the store, not pursuant to any call made by someone connected with the store, but pursuant to orders from police headquarters or a superior officer, arrested petitioners without being requested to make the arrest by any agent of the store, and petitioners were prosecuted by the City although no one connected with the store signed a complaint or affidavit upon which the prosecution was based (Gober and Davis, R. 19-20, 26-27; Hutchinson and King 107, 112, 113, 115, 118, 121-122; Parker and West 159-161, 165; Sanders and Westmoreland 210, 213; Walker and Willis 252-253, 254).

4. In no case is there evidence that the person requesting petitioners to leave the lunch area identified himself, or stated his authority to make the request, or requested petitioners to leave the store as opposed to the lunch area (Gober and Davis, R. 21, 23, 44-45; Hutchinson and King 110, 115-116; Parker and West 162, 171; Sanders and Westmoreland 209-210, 211, 213; Walker and Willis 252-253, 256).

5. In each case the charge was the same, i.e., petitioners "did go or remain on the premises of another, said premises being the area used for eating, drinking and dining purposes . . . after being warned not to do so" (Gober, R. 2, Davis 73, Hutchinson 93, King 129, Parker 145, West 183, Sanders 195, Westmoreland 225, Walker 239, Willis 267).

6. Petitioners were at all times orderly (Gober and Davis, R. 19-20; Hutchinson and King 109, 117-118; Parker and West 158; Sanders and Westmoreland 209).

Summary of Argument

I.

Petitioners' convictions cannot stand consistently with the equal protection and due process imperatives of the Fourteenth Amendment. These convictions were, in reality, predicated on a city ordinance requiring racial segregation in eating facilities, buttressed by a massive state policy of racial segregation, the enforcement f which, as demonstrated by the records in these cases, clearly violates the equal protection clause of the Fourteenth Amendment. *Turner v. City of Memphis*, 369 U. S. 350. If the department stores' policy were the sole basis for these convictions, these convictions would nevertheless violate the equal protection clause of the Fourteenth Amendment since enforcement of such private discrimination was dependent upon the state's exertion of the full power of its judicial arm. *Shelley* v. *Kraemer*, 334 U. S. 1. There is no asserted invasion of the right of privacy in these cases. The premises in question were thrown open to the general public, including petitioners. *Marsh* v. *Alabama*, 326 U. S. 501. The premises are a part of the public life of the community, extensively regulated and licensed by the state, making state enforcement of racial segregation therein peculiarly repugnant to the requirements of equal protection. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 714. The property right asserted, which is a right to control the associations of customers at a public department store lunch counter, when all other counters are free from such control, is patently inconsequential when weighed against the high

purposes of the Fourteenth Amendment. The state cannot claim the right to enforce racial segregation in a public department store where the segregation has been generated by state policy and the state has failed to protect its citizens, for whose benefit the Fourteenth Amendment was adopted, with respect to equal access to public accommodations. The decision in the *Civil Rights Cases*, 109 U. S. 3, was predicated on the assumption that the states had provided such protection.

II.

The due process guarantees of the Fourteenth Amendment require reversal of these convictions as infringements upon freedom of speech. Petitioners here sought peacefully to persuade the owners of department stores to serve them on the same terms and conditions applicable to white customers. Their efforts at persuasion took the form of a non-verbal demonstration called a "sit-in". The protest was entirely appropriate to the circumstances, including the use to which the property had been dedicated by the owners. The owners chose to endure the controversy, rather than call the police, demand arrest, or file a formal complaint, by letting the petitioners remain seated at the lunch counter or by closing it to all customers. Their expression was not in such circumstances or of such a nature as to pose a clear and present danger of any substantive evil which Alabama had a right to proscribe. The ordinance, for violation of which petitioners were actually convicted, is unreasonably vague and, therefore, offends the due process clause of the Fourteenth Amendment. The ordinance was construed by the Alabama courts to uphold convictions obtained without proof that petitioners were requested to leave by a person who had established his or her authority to issue the request when same was made. Due process requires more notice that the law will exact a penalty under the circumstances of this case.

ARGUMENT

I.

Alabama's Judgments in These Cases Are Inconsistent With the Constitutional Mandate of Equal Protection.

A. Petitioners' Convictions Were Decreed by Birmingham's Restaurant Segregation Ordinance.

The constitutional command—"No state shall . . . deny to any person within its jurisdiction the equal protection of the laws"—is an injunction against state decreed exclusion of Negroes from eating facilities. *Turner* v. *City of Memphis*, 369 U. S. 350; *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715; *Boynton* v. *Virginia*, 364 U. S. 454. However, notwithstanding these recent decisions by this Court, and the frequency with which this Court has invoked this prohibition against various other manifestations of state enforced racial segregation, *Bailey* v. *Patterson*, 369 U. S. 31; *State Athletic Commission* v. *Dorsey*, 359 U. S. 533; *Aaron* v. *Cooper*, 358 U. S. 1; *Holmes* v. *City of Atlanta*, 350 U. S. 879; *Brown* v. *Board of Education of Topeka*, 347 U. S. 483; *Barrows* v. *Jackson*, 346 U. S. 249; *Davis* v. *Schnell*, 81 F. Supp. 872 (S. D. Ala. 1949) aff'd 336 U. S. 933; *Shelley* v. *Kraemer*, 334 U. S. 1; *Buchanan* v. *Warley*, 245 U. S. 60, petitioners have been convicted by the courts of Alabama. Their crime: as Negroes they sat at a white department store lunch counter requesting service. If petitioners had been white, and their conduct identical, they would not have suffered the same fate.

Alabama's racial policies are a matter of common and historical knowledge still clearly defined by statute and ordinance. In this case, §369, General Code of Birmingham, 1944, makes it "unlawful to conduct a restaurant or

other place for the serving of food in the city, at which white and colored people are served in the same room, unless such white and colored persons are effectually separated by a solid partition extending from the floor upward to a distance of seven feet or higher, and unless a separate entrance from the street is provided for each compartment."

In apparent compliance with this ordinance, Pizitz's Department Store provides a food service for its white customers on the mezzanine (R. 44) and a separate food service for its Negro customers in the basement (R. 24). The food concessionaire at Loveman's Department Store testified that there are two food areas in Loveman's, one on the mezzanine and one in the basement, both for white customers only (R. 114). On the other hand, the store detective testified that on the seventh floor there was a place where Negroes "may" be served food (R. 119). Newberry's has two lunch counters for its white customers, one on the first floor, the other in the basement (R. 163). Colored customers are served on the fourth floor (R. 163). Kress's 5 and 10¢ Store has a luncheon area in the basement for its white customers. Negroes are permitted to purchase food at this counter to take out; they are not permitted to sit down and eat (R. 218). Woolworth's has a lunch counter on the first floor for white persons only (R. 251, 256).

Consequently, as each arresting officer entered the department store and saw "two Negro males" seated at a lunch counter customarily serving whites only, this, without further explanation, was cause for arrest.

The City's attorney said to the arresting officer in the first case:

"Q. When you got to the dining or eating area what did you find that was unusual or out of the ordinary?
A. Well, I found that the cafeteria part was closed

to all customers and I found two Negro males seated in the eating part of the cafeteria" (R. 18).

In the second case, the police officer who made the arrest simply observed as he entered the store that, "two Negro boys" were sitting "to the right of the Cashier's cage at the tables there where food is served" (R. 107) with whom he had no conversation "other than to tell them they were under arrest" (R. 107).

Again, in the third case, the arresting officer was asked:

"Q. Did you find anything out of the ordinary there at that time?" [when he entered the store] A. Two colored males were sitting at the luncheon counter" (R. 158).

Similarly, in the fourth case, the officer was queried as follows:

"Q. What did you observe if anything unusual on that occasion? A. Officer Thompson and I went downstairs in the basement. The lunch counter was closed. The lights were out. We observed two black males, Roosevelt Westmoreland and Robert D. Sanders, sitting there" (R. 209).

And finally, in the last case, the officer was asked:

"Q. Did you observe anything usual or out of the ordinary on that occasion? A. The lights were out over the luncheon counter and there were two Negro males seated at the counter. Mrs. Evans was waiting there for the officer" (R. 251).

The records in these cases clearly demonstrate that the racial policy being enforced here was that of the City and not that of the owners of the premises.

The records disclose first that in each instance the police arrived pursuant to their own volition and not pursuant to any call from the owner of the premises or one of his agents (R. 26, 112, 165, 212-213, 252).

Second, the evidence is uncontradicted that in no case was the officer requested by an employee of the store to arrest petitioners (R. 26, 121, 165, 213, 253).

Moreover, the prosecutions of petitioners were not predicated on any formal complaint or affidavit filed by any person connected with the stores (R. 26, 121-122, 165, 213-214, 253).

In the first case, involving Pizitz's Department Store, the assistant to the president in requesting petitioners to leave the tea room "told them it would be against the law to serve them there" (R. 24). Petitioners' counsel then advised the trial court:

> "It is our theory of this case it is one based simply on the City's segregation ordinance and Mr. Gottlinger, Mr. Pizitz, the police officers and everybody involved acted simply because of the segregation law and not because of Pizitz's policy" (R. 24).

The court did not permit the development of this theory (R. 24-26).

A similar effort by petitioners' counsel in another case to develop the fact that the exclusion from the dining area was not required by the policy of the store, as distinct from the policy of the city, also was restrained by the court. Petitioners' counsel queried:

> "Q. Does Newberry's have a policy of serving and not serving persons of another race or particular color?" (R. 166).

This question was objected to as incompetent, irrelevant and immaterial (R. 167). In sustaining the objection the court said:

> "Can we adjudicate cases here on persons or corporations' policies?" (R. 167) " * * * We can't. I pointed that out this morning. We are not dealing with policies of stores. We are dealing with a city code" (R. 167).

In the case involving Loveman's department store, the store detective who had notified the people to leave the dining area when he noticed people were milling around (R. 114-115) and after doing so noticed the petitioners in that case, Hutchinson and King, sitting at the table (R. 117), was specifically questioned regarding Loveman's policy of serving Negroes:

> "Q. Do you know have they been told not to come and eat in the tea room at Loveman's?"
>
> * * * * * *
>
> "A. Well in my short time I have been there I have never, the policy of the store I do not know, I have never been informed in regard to that although on all of the occasions I visited the mezzanine I have never seen any colored eating on the mezzanine" (R. 121).

Perhaps the most significant fact developed by petitioners' counsel relating to the question whether a City segregation ordinance was being adhered to by the owners of the premises was the fact that in each of the department stores petitioners were accommodated at all counters except the food service counters (R. 43-44, 50; 114-119-120; 165-166, 169-170; 214-216, 218; 255-256, 257-258).

The testimony in these cases leaves no doubt that the owners of the premises did not demand arrest and prosecution of petitioners. Their method of resolving the controversy was simply to close the counters or let petitioners just sit there (R. 18, 107, 164, 209, 251). They obviously did not desire to incur the risk of losing their Negro trade since in each case they requested only that these Negro customers leave that particular counter or area, not the store (R. 45, 115-116, 162, 213, 253).

Petitioners were therefore arrested, charged, prosecuted, convicted, and sentenced by the City of Birmingham in order to enforce its unequivocal policy of racial discrimination in eating facilities set forth in §369 of the City's Code.*

B. Petitioners' Convictions Were Decreed by a Massive State Segregation Policy.

Birmingham's racial segregation edicts as expressed by ordinance have not been limited to restaurants. Recently, in *Shuttlesworth* v. *Gaylord*, 202 F. Supp. 59 (N. D. Ala. 1961) an ordinance requiring racial segregation in recreational facilities was held constitutionally void on equal protection grounds. An ordinance restricting the areas in which Birmingham Negroes might live earlier met a similar demise. *Monk* v. *City of Birmingham*, 87 F. Supp. 538 (N. D. Ala. 1949), aff'd 185 F. 2d 859, cert. den. 341 U. S. 940. Even in the absence of an ordinance, segregation has been enforced as a matter of policy, custom, usage and arrest, *Baldwin* v. *Morgan*, 251 F. 2d 780 (5th Cir. 1958), as well as regulation, *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531 (5th Cir. 1960).

* Ordinances of the City of Birmingham are judicially noticeable by the Alabama courts. Code of Alabama, Recompiled 1958, Title 7, §429(1).

Also operative here was an equally affirmative state policy of racial segregation in many other areas clearly defined by statute. Alabama is, of course, one of the southern states in which there is still complete racial segregation at every level of public education, despite the repeal of school segregation laws in 1956,[1] replaced by a state pupil assignment law, see, *Shuttlesworth* v. *Board of Education*, 162 F. Supp. 372 (N. D. Ala. 58 aff'd 358 U. S. 101), which has produced no desegregation.[2] There can be no intermarriage between the races in Alabama.[3] Adultery and fornication between Negroes and whites is a special crime.[4] State policy requires the segregation of paupers,[5] prisoners,[6] railroad waiting rooms,[7] railroad coaches,[8] motor busses,[9] accounts of poll taxes paid by each race,[10] delinquents,[11] tubercular patients,[12] and residents of mental institutions.[13]

Consequently, involved in this case is the enforcement of state policy expressed in a city ordinance and buttressed by

---

[1] Ala. Const., Art. 14, §256.

[2] *Southern School News*, August 1960, Vol. 9, No. 2, p. 1.

[3] *Green* v. *State*, 58 Ala. 190.

[4] Ala. Code, Recompiled, 1958, Title 14-360.

[5] *Id.* Title 44-10.

[6] *Id.* Title 45-52 and 121-3.

[7] *Id.* Title 48-186.

[8] *Id.* Title 48-196-198.

[9] *Id.* Title 48-301 (31a) to (31c) held unconstitutional in *Browder* v. *Gayle*, 142 F. Supp. 707, aff'd 352 U. S. 903.

[10] *Id.* Title 51-244.

[11] *Id.* Title 52-613 (1).

[12] *Id.* Title 45 §4

[13] *Id.* Title 45 §248.

a network of state segregation statutes. But if there is anything which is proscribed by the equal protection clause of the Fourteenth Amendment to the Federal Constitution, it is the enforcement of an affirmative state policy of racial segregation. And when, as here, it is enforced by the executive and judicial arms of the state, via arrest, prosecution, conviction and sentence for trespass after warning, consisting of refusal to leave a white department store lunch counter, the Fourteenth Amendment's injunction clearly applies. *Shelley* v. *Kraemer*, 334 U. S. 1.

C. State Enforcement of Private Racial Discrimination Is Likewise Proscribed by the Fourteenth Amendment.

Birmingham's segregation ordinance, by its terms, does not place any criminal liability on petitioners. The ordinance makes it unlawful to operate a restaurant which is nonsegregated. Consequently, in each of these cases, the City complained that these petitioners "did go or remain on the premises of another, said premises being the area used for eating, drinking, and dining purposes and located within the building commonly and customarily known as .....", after being warned not to do so, contrary to and in violation of Section 1436 of the General City Code of Birmingham of 1944."

The City's attorney contended on the trial that there was nothing more involved here than the enforcement of this ordinance. "I want to object to the references to the segregation ordinance. This ordinance has nothing to do with the matter of segregation and applies to anybody on the premises of another who is asked to leave and refuses. Segregation is not mentioned in the ordinance" (R. 26).

But in every case, the City introduced evidence to prove that petitioners were asked by some employee of the store

to leave the dining area reserved for white customers (R. 21, 115, 162, 211, 252-253).

The record is thus clear that the City was fully aware that the enforcement of racial segregation was involved in its prosecution of petitioners.

Petitioners' convictions were affirmed by the Court of Appeals of Alabama as against a Fourteenth Amendment equal protection claim on the ground that the department store had "a full right to limit the use of its own premises as it saw fit" (R. 63). But, *Shelley* v. *Kraemer*, 334 U. S. 1, teaches that although there may, in some circumstances, be a personal privilege to discriminate on the grounds of race, this privilege may be exercised only so long as it does not require the assistance of the state for its effectuation. Discrimination on the part of a private individual becomes state action at the point at which the state becomes involved. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715. And the fact that such discrimination is enforced by the judicial arm of the state acting as a "neutral" referee does not preclude application of the Fourteenth Amendment's prohibition. *Shelley* v. *Kraemer*, *supra*. See also, *Barrows* v. *Jackson*, 341 U. S. 524; *N.A.A.C.P.* v. *Alabama*, 357 U. S. 499, 463. The Fourteenth Amendment also has been invoked against racial discrimination on the part of the police. *Taylor* v. *Louisiana*, 370 U. S. 154; *Monroe* v. *Pape*, 365 U. S. 167; *Screws* v. *United States*, 325 U. S. 91. The only private discrimination outside the scope of the Fourteenth Amendment is that which is "unsupported by state authority in the shape of laws, customs or judicial or executive proceedings" or "not sanctioned in some way by the state." *Civil Rights Cases*, 109 U. S. 3, 17. Clearly within the scope of that amendment is "state laws or state proceedings," *Civil Rights Cases*, *supra*, at pp. 11, 23.

These convictions are void not only because they fly in the face of the Fourteenth Amendment's prohibitions, but they deprive petitioners of rights secured to them by laws enacted by the Congress to enforce the provisions of that Amendment. Title 42, United States Code, §§1981, 1982 and 1983. Section 1981 provides, "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts * * * and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens * * *." This is a case, therefore, where "the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination." *Fay* v. *New York*, 332 U. S. 261, 282-283.

In any event, the City's segregation ordinance and the massive state racist policy of which that ordinance is a part, precludes any suggestion that here the department store owners acted privately, unsanctioned by the state. In the context of this case, the department store's "preference does not make the action 'private,' rather than 'state,' action. If it did, a minuscule of private prejudice would convert state into private action. Moreover, where the segregation policy is the policy of a state, it matters not that the agency to enforce it is a private enterprise." *Garner* v. *Louisiana*, 368 U. S. 157, 181 (Mr. Justice Douglas concurring).

The Court of Appeals of Alabama ruled that the appellant "would destroy [the department store's] property right by attempting to misapply the Fourteenth Amendment, ignoring the provision in that Amendment that grants the right to a private property owner to the full use of his

property, . . . " (R. 63). Significantly enough, the state does not claim that it prosecuted petitioners to secure the owner's interest in privacy. Such a claim would be inconsistent with the obvious fact that the owner of the premises here has thrown them open to the public, including petitioners, for his own profit. Any suggestion that some exception to the *Shelley* rule should be made for a corporation which has sought state aid in enforcing racial discrimination in its premises open to the general public for profit, because somehow the inviolability of a private home may be impaired, is without merit. If this case involved the enforcement of a trespass law to protect a real interest in privacy, as opposed to the situation here, obviously a different result might obtain because of the importance of the right of privacy which this Court has protected in other contexts. *Breard* v. *Alexandria*, 341 U. S. 622, 626, 644; *Kovacs* v. *Cooper*, 336 U. S. 77. But in *Martin* v. *Struthers*, 319 U. S. 141, this Court weighed the privacy consideration against the competing constitutional right of freedom of religion and ruled in favor of the latter.[14] In these cases, the right to be free from state enforced racial segregation such as is evidenced by these records is not competing with any other interest which the state may have in protecting privacy.[15]

---

[14] And see *Watchtower Bible and Tract Soc.* v. *Metropolitan Life Ins. Co.*, 297 N. Y. 339, 79 N. E. 2d 433 (1948), in which the New York courts distinguished between the right to solicit in the streets of a large scale housing project and to go, without invitation, into the hallways to visit private apartments.

[15] To weigh considerations of privacy in a case involving racial discrimination would comport with the views of the framers of the Fourteenth Amendment. During the debate on the bill to amend the *Civil Rights Act* of 1866, 14 Stat. 27, which served as the precursor to the *Civil Rights Act* of 1875, 18 Stat. 335, Senator Sumner distinguished between a man's home and places and facilities of public accommodation licensed by law: "Each person, whether Senator or citizen, is always free to choose who shall be his

D. No Essential Property Right of the Department Store Is Infringed Here.

In affirming the convictions of petitioners the Court of Appeals of Alabama ruled that the petitioners' Fourteenth Amendment claims would do violence to the property rights of the store owners: "The right to operate a restaurant on its own premises under such conditions as it saw fit to impose was an inalienable property right possessed by" the department stores (R. 63). The Alabama court would thus distinguish these cases from those in which this Court invoked the prohibitions of the Fourteenth Amendment

---

friend, his associate, his guest. And does not the ancient proverb declare that a man is known by the company he keeps? But this assumes that he may choose for himself. His house is his 'castle'; and this very designation, borrowed from the common law, shows his absolute independence within its walls; * * * but when he leaves his 'castle' and goes abroad, this independence is at an end. He walks the streets; but he is subject to the prevailing law of *Equality;* nor can he appropriate the sidewalk to his own exclusive use, driving into the gutter all whose skin is less white than his own. But nobody pretends that Equality in the highway, whether on pavement or sidewalk, is a question of society. And, permit me to say that *Equality in all institutions created or regulated by law* is as little a question of society" (emphasis added). After quoting Holingshed, Story, Kent, and Parsons on the common law duties of innkeepers and common carriers to treat all alike, Sumner then said: "As the inn cannot close its doors, or the public conveyance refuse a seat to any paying traveler, decent in condition, so must it be with the theater and other places of public amusement. Here are institutions whose peculiar object is the 'pursuit of happiness,' which has been placed among the equal rights of all." Cong. Globe, 42d Cong., 2d Sess. 382-383 (1872). It is not unreasonable that considerations of privacy should weigh so heavily. The right of privacy against intrusion on one's premises or into one's personal affairs, 4 Blackstone's Commentaries Ch. 13, §5(6) (Wendell's Ed. 1850), was recognized at common law, and is recognized generally in American law. See A. L. I., *Restatement of Torts*, §867 (1939). This Court has recently reiterated that the due process clause protects privacy against intrusion by the States. *Mapp* v. *Ohio*, 367 U. S. 643, 654, 655; *Wolf* v. *Colorado*, 338 U. S. 25, 27-28. Cf. *Gilbert* v. *Minnesota*, 254 U. S. 325, 336 (Justice Brandeis dissenting); *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, 464, 468.

against state enforcement of racial segregation by proclaiming the rights involved here to be wholly and solely the inalienable property rights of the store owners.

For this reason, a reexamination of the property right asserted here is required. States can and do prohibit racial discrimination in public eating places without offending any constitutionally protected property rights.[16] Notwithstanding the prohibitions of the Fourteenth Amendment, Alabama has imposed the requirement of racial segregation on private property owners as evidenced by the restaurant segregation ordinance in this case. Consequently, the claimed inviolate property right to discriminate as one desires on his property is not quite so absolute and inalienable as Alabama claims. "[T]he power of the state to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment." *Shelley* v. *Kraemer*, 334 U. S. 122 citing *Marsh* v. *Alabama*, 326 U. S. 501. In the *Marsh* case, *supra*, at 506, this Court ruled: "The more an owner for his benefit opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Cf. *Republic Aviation Co.* v. *Labor Board*, 324, U. S. 793, 798, 802 n. 8." No claim is made here that the Fourteenth Amendment forbids a state to assist in the enforcement of property rights, *per se*. Obviously the state has an obligation not to engage in or assist in the invasion of the privacy of the home. Considerations of privacy discussed in more detail,

---

[16] See *Western Turf Ass'n* v. *Greenberg*, 204 U. S. 359; *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88; *District of Columbia* v. *John R. Thompson Co.*, 346 U. S. 100; *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28; Konvitz & Leskes, *A Century of Civil Rights* 172-177 (1961).

supra pp. 27-29, afford a basis for distinguishing between permissible and impermissible state action in this area.

Since "property or ownership" is, as Mr. Justice Cardozo has written, a "bundle of privileges," *Hanneford* v. *Silas Mason Co.*, 300 U. S. 577, 582, or as stated elsewhere, "a group or bundle of rights" given by the state, Blodgett, *Comparative Economic Systems* 24 (1944), it matters a great deal which of the rights or privileges constituting the owner's property was enforced in this prosecution. Various characteristics of the property interest demonstrate that this case should not depart from the general rule that states may not support racial discrimination.

The asserted property interest is but a claimed right to control the conduct and associations of others. But this claimed right is clearly separable from other incidents of ownership of the property such as fixing prices, choosing merchandise for sale, setting hours of business, selling the business or closing it down, to name but a few.

The power to regulate the conduct and associations of others has never been an unrestrained property right. Illustrations include limitations that the law has placed on those who would use their property to control the conduct of donees, as by requiring divorce or separation,[17] or with respect to marriage,[18] restrictions compelling separation of

[17] Provisions requiring divorce or separation were held void in: *Dwyer* v. *Kuchler*, 116 N. J. Eq. 426, 174 Atl. 154 (Ch. 1934); *In Re Haight's Will*, 51 App. Div. 310, 64 N. Y. S. 1029 (2d Dept. 1900); *Davidson* v. *Wilmington Trust Co.*, 23 Del. Ch. 1; 2 A. 2d 285 (Ch. 1938); *Winterland* v. *Winterland*, 389 Ill. 384, 59 N. E. 2d 661 (1945); *Hawke* v. *Euyhast*, 30 Neb. 149, 46 N. W. 422 (1890); *Cruger* v. *Phelps*, 21 Misc. 252, 47 N. Y. S. 61 (Sup. Ct. 1897).

[18] Certain marriage clauses have been held ineffective, 6 Powell, *Real Property* ¶851; A. L. I., *Restatement of Property*, §424 (1944); *Maddox* v. *Maddox, Adm'r*, 52 Va. 804 (1954).

a child from its parents,[19] and requirements controlling certain personal habits.[20]

The power to impose restraints on alienation has been severely limited by courts and legislatures.[21] Restrictive covenants have been limited by common law.[22] Their enforcement in courts of equity[23] and courts of law[24] has been forbidden by the Fourteenth Amendment where race was the reason for the restriction. And, of course, the rule against perpetuities is of ancient lineage.[25]

A business man is not always free to set his own prices. Fair trade acts on the one hand, approved by the Miller-Tydings Act amendment of §1 of the Sherman Act, 15 U. S. C. §1; require some businessmen to sell at fixed prices.

---

[19] Restrictions which compel the separation of a minor child from its parent have not been viewed with favor. 6 Powell, *Real Property* ¶858, at 64; *In Re Carple's Estate*, 140 Misc. 459, 250 N. Y. S. 680 (Surr. Ct. 1931); *In Re Forte's Will*, 149 Misc. 327, 267 N. Y. S. 603 (Surr. Ct. 1933); *In Re Rooney's Estate*, 161 Misc. 626, 292 N. Y. S. 476 (Surr. Ct. 1936).

[20] *Holmes* v. *Connecticut Trust & Safe Deposit Co.*, 92 Conn. 507, 103 Atl. 640 (1918) (condition that conveyee's husband abstain from tobacco and liquor held void); cf. *D'Arcangelo* v. *D'Arcangelo*, 137 N. J. Eq. 63, 43 A. 2d 169 (Ch. 1945) (legatee must employ testator's brother as bus driver, at designated salary for a corporation in which legatee had received an interest; invalidated).

[21] Gray, *Restraints on the Alienation of Property* §259 (2d ed. 1895); A. L. I., *Restatement of Property*, Div. 4, Social Restrictions Imposed Upon the Creation of Property Interests 2121 (1944); Browder, *Illegal Conditions and Limitations: Miscellaneous Provisions*, 2 Okla. L. Rev. 237 (1948).

[22] *Porter* v. *Barrett*, 233 Mich. 373, 206 N. W. 532 (1925).

[23] *Shelley* v. *Kraemer*, 334 U. S. 1.

[24] *Barrows* v. *Jackson*, 346 U. S. 249.

[25] Gray, *The Rule Against Perpetuities* §201 (4th ed. 1942); 6 Powell, *Real Property*, ¶¶759-827; Leach, *Perpetuities in a Nutshell*, 51 Harv. L. Rev. 638 (1938).

Anti-trust concepts on the other hand, originating in the common law, *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 (1940), *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898), aff'd, 175 U. S. 211 (1899), and embodied in the statutes of the United States, Robinson-Patman Act, 15 U. S. C. §13 *et seq.*; Clayton Act, 15 U. S. C. §12 *et seq.*; Sherman Anti-Trust Act, 15 U. S. C. §1 *et seq.*, have condemned price discrimination, price fixing, and conspiracies to fix resale prices. The right to select customers has also been curtailed by the antitrust laws,[26] as well as common law, and even the right of a single trader has been greatly limited.[27]

Numerous statutes and ordinances limit property holders in their power to refuse to sell or rent on grounds of race or color[28] or to refuse to serve patrons in public accom-

---

[26] *Klor's* v. *Broadway-Hale Stores*, 359 U. S. 207 (1959); *Lorain Journal Co.* v. *U. S.*, 342 U. S. 143 (1951).

[27] *United States* v. *Colgate*, 250 U. S. 300 (1919); See *U. S.* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960); Rankin, *The Parke, Davis Case*, 1961 Antitrust Law Symposium, New York State Bar Association Section on Antitrust Law 63 (1961).

[28] Cal. Health & Safety Code §35740; Mass. G. L. c. 151B, §6 (Supp. 1961); N. J. Stat. Ann. §18:25-4 (Supp. 1961); Wash. Rev. Code §§49.60.030, 49.60.040 (1957); Cal. Civil Code, §51 (Supp. 1961); Colo. Rev. Stat. Ann. §§69-7-1, to 69-7-7 (Supp. 1960); Conn. Stat. Rev. §53-35 (Supp. 1960); Mass. Gen. L. c. 151B, §4 (Supp. 1961), as amended by Acts, 1961, c. 128; Minn. Stat. Ann. §§363.01-.13, as amended by L. 1961, c. 428 to become effective in 12/31/62; Ore. Rev. Stat. §659.033 (1959); N. H. Rev. Stat. Ann. §354:1 (Supp. 1961); N. Y. Executive Law, §290 (Supp. 1962); Pa. Stat. Ann., tit. 43, §953 (Supp. 1961). Cases holding some of the ordinances and statutes constitutional are: *Levitt & Sons, Inc.* v. *Division Against Discrimination*, 31 N. J. 514, 158 A. 2d 177 (1960); *Mass. Comm'n Against Discrimination* v. *Colangelo*, 30 U. S. L. W. 2608 (Mass. 1962); *State Comm'n Against Discrimination* v. *Pelham Hall Apartments*, 10 Misc. 2d 334, 170 N. Y. S. 2d 750 (Sup. Ct. 1958).

modations on the grounds of race or color.[29] Historically, the right to select customers has been limited by common law and statute.[30] It is well known that innkeepers and carriers do not have freedom arbitrarily to select or reject patrons. Beale, *The Law of Innkeepers and Hotels* (1906).

The foregoing limitations on the power to control the conduct and associations of others describe particular examples of the general principle that "property rights" are not "sacred" and "inalienable" in the sense that common law, statute, and constitution may not limit or shape them where they have harmful public consequences. Further

---

[29] Cal. Civil Code, §§51-52 (Supp. 1960); Colo. Rev. Stat. Ann. 25—1—1 *et seq.* (1953); Conn. Gen. Stat Rev. §53-35 (Supp. 1961); D. C. Code §47-2901 *et seq.* (Supp. 1960); Indiana Stat. Ann. §§10-901, 10-902 (Supp. 1962); Iowa Code Ann. §735.1 (1950); Kansas Gen. Stat. Ann. §21-2424 (1949); Mass. Gen. L. c. 272, §§92A, 98 (1956); Mich. Stat. Ann. §28.343 (Supp. 1959); Minn. Stat. Ann. §327.09 (1947); Mont. Rev. Codes §64-211 (Supp. 1961); Neb. Rev. Stat. §§20-101, 102 (1943); N. H. Rev. Stat. Ann. §354:1 (Supp. 1961); N. J. Stat. Ann. §§10:1-2 to 10:1-7 (1960); N. M. Stat. Ann. §§49-8-1 to 49-8-6 (Supp. 1961); N. Y. Civil Rights Law §40 (1948); Executive Law, §§292(9), 296(2) (Supp. 1962); N. D. Cent. Code, §12-22-30 (Supp. 1961); Ohio Rev. Code §4112.02(G) (Supp. 1961); Ore. Rev. Stat. §§30.670-.680, as amended by L. 1961 c. 247; Pa. Stat. Ann., tit. 18, §4654, as amended by Act No. 19 (1961); R. I. Gen. Laws §§11-24-1 to 11-24-6 (1956); Vt. Stat. Ann., tit. 13, §§1451, 1452 (1958); Wash. Rev. Code, §§49.60.040, 49.60.215 (1962); Wis. Stat. Ann. §924.04 (1958), as amended (Supp. 1962); Wyo. Stat. §§6-83.1, 6-83.2 (Supp. 1961).

[30] Mund, "The Right to Buy—And Its Denial to Small Business," Senate Document #32, 85th Cong., 1st Sess., Select Committee on Small Business (1957); Adler, *Business Jurisprudence*, 28 Harv. L. Rev. 135 (1914); Statute of Labourers, 25 Ed. III, Stat. 1 (1350) (no one could refuse to practice his calling to whomsoever applied). The following statutes penalized a businessman's refusal to serve all comers: (1357), 31 Ed. III, c. 10 (victualers); (1360), 35 Ed. III (fishermen); (1433), 11 Hen. VI, c. 12 (chandlers); (1464), 4 Ed. IV, c. 7 (shoemakers); *Lane* v. *Cotton*, 1 Ld. Raym. 646, 655; 1 Salk. 18, 19; 12 Mod. 472, 485 ("If a man takes upon himself a public employment, he is bound to serve the public as far as the employment extends; and for refusal an action lies . . .").

examples indicate different aspects of this thoroughly settled, fundamental legal truth. Property owners have been compelled to destroy valuable cedar forests which harbored fungus threatening neighboring apple orchards,[31] to spend funds to install fire extinguishing equipment,[32] to limit the size of billboards,[33] and to make loaves of bread a certain size.[34] Moreover, employers have been compelled to allow labor organizational activities to be conducted on their property.[35]

And only recently property owners have been forbidden to use their property in a way which would intimidate Negro lessees in the exercise of the right to vote. *United States* v. *Beaty*, 288 F. 2d 653 (5th Cir. 1961).

Other facets of the claimed property right to discrimination on the basis of race in these circumstances are clearly separable from the core of the owner's interest in its business. In addition to the fact that no privacy has been intruded upon, the asserted property right did not seek to protect the premises from a use alien to their intended function. Petitioners sought only to use the premises and consume food in an area provided for such activity. The asserted right to exclude expressed only a preference for racial segregation and not any objection to petitioners' demeanor or conduct. The capricious nature of discrimination is highlighted by the fact that in one store, Kress' 5 & 10, there is a luncheonette in the basement where

[31] *Miller* v. *Schoene*, 276 U. S. 272 (1928).

[32] *Queenside Hills Realty Co.* v. *Saxl*, 328 U. S. 80 (1946).

[33] *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608 (1935); *St. Louis Poster Advertising Co.* v. *St. Louis*, 249 U. S. 269 (1919); *Thomas Cusack Co.* v. *Chicago*, 242 U. S. 526 (1917).

[34] *Schmidinger* v. *Chicago*, 226 U. S. 578.

[35] *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1955); *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U. S. 793 (1945).

Negroes are permitted to purchase food to take out but are not permitted to sit down and eat (R. 218).

As in *Shelley* v. *Kraemer*, 334 U. S. 1, 10, the restaurant did not limit the type of use made of the premises, nor the type of persons or conduct permitted thereon. The restriction referred only to race. Moreover, the property interest enforced below attempted only to achieve discrimination in premises thrown open by the owner to the general public, including petitioners, for his own business advantage. Cf. *Marsh* v. *Alabama*, 326 U. S. 501, 506. The specific area within the store in dispute, i.e., the lunch counter, was a public part of the premises and an integral part of a single commercial establishment serving the public. Consequently, the property interest enforced below is simply a claimed right to enforce racial discrimination in very particular circumstances. It obviously is not true that refusal to enforce this asserted incident of ownership destroys the whole bundle of rights. That result would be contrary to the entire genius of our jurisprudence. The premise that the stores own the property does not lead to the ultimate logical extreme that they may absolutely control the conduct and association of others in the store. Mr. Justice Holmes has written that, "All rights tend to declare themselves absolute to their logical extreme yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded and which become strong enough to hold their own when a certain point is reached." *Hudson County Water Co.* v. *McCarter*, 209 U. S. 345, 355. Only last term Mr. Justice Frankfurter, dissenting, pointed out the indubitable truth, "That an end of discrimination against the Negro was the compelling motive of the Civil War Amendments: The Fifteenth expresses this in terms and it is no less true of the Equal Protection Clause of the

Fourteenth." *Baker* v. *Carr*, 369 U. S. 186, 285-286. In these cases the department stores property rights are limited by the Fourteenth Amendment and do not reach the constitutionally untenable, logical extreme that the states may aid the stores in upholding racism. "The Constitution confers upon no individual the right to demand action by the state which results in the denial of equal protection of other individuals." *Shelley* v. *Kraemer*, 324 U. S. 1, 22.

E. The State May Not Arrest and Convict Petitioners for Having Violated the State's Segregation Policy in Premises in Which the State Is Deeply Involved Through Its Licensing and Regulatory Powers.

The all pervading nature of the state's involvement—evidenced by extensive regulation and licensing—in the premises where petitioners were arrested for violating the state's racial segregation policy demonstrates even further the necessity for invalidating the judgments below. Discrimination here has been enforced in an area of public life with which the state is so intimately involved that the department stores lunch counters are by law extensively licensed and regulated. The extensive public character of the enterprise is revealed not only by the fact that the stores serve the general public but by the interest which the state has demonstrated in that service. There is detailed regulation of business corporations of the type involved here under Alabama law.[36] Dispensing of food in Birmingham also is extensively regulated,[37] including inspection of premises and the issuing of permits by the Health Department.[38]

---

[36] Code of Alabama, Recompiled 1958, Title 10, §§1 to 263.

[37] General City Code Birmingham, 1944, Ch. 14.

[38] *Id.* §§348 and 376(a).

Alabama imposes a restaurant license tax,[39] requires a soft drink retailer's license,[40] stores generally must be licensed,[41] and of course there are health laws and regulations for the operation of food handling establishments under state laws.[42] As Mr. Justice Douglas wrote in *Garner v. Louisiana*, 368 U. S. at 183-84:

> A state may not require segregation of the races on conventional public utilities any more than it can segregate them in ordinary public facilities. As stated by the court in Boman v. Birmingham Transit Co. (C. A. 5 Ala.), 280 F. 2d 531, 535, a public utility "is doing something the state deems useful for the public necessity or convenience." It was this idea that the first Mr. Justice Harlan, dissenting in Plessy v. Ferguson, . . . advanced. Though a common carrier is private enterprise, "its work" he maintained is public. *Id.* 163 U. S. at 554. And there can be no difference, in my view, between one kind of business that is regulated in the public interest and another kind so far as the problem of racial segregation is concerned. I do not believe that a State that licenses a business can license it to serve only whites or only blacks or only yellows or only browns. Race is an impermissible classification when it comes to parks or other municipal facilities by reason of the Equal Protection Clause of the Fourteenth Amendment.

In *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, this Court found sufficient governmental responsibility to re-

---

[39] Code of Alabama, Recompiled 1958, Title 51, §582.

[40] *Id.* Title 51, Section 482.

[41] *Id.* Title 51, Sections 620-629.

[42] *Id.* Title 22, Section 85.

quire decision of a Fifth Amendment due process claim where the principal governmental involvement was a decision by a regulatory body to do nothing about private activity (radio broadcast on streetcars) it could have prohibited. The lunch counter in this case is also regulated by government, although perhaps not so closely as the streetcar company in *Pollak*. But this case has an element that the *Pollak* case did not, i.e., that government has done so much to encourage racial segregation in public life that it must share responsibility for the discriminatory rule.

And see *Steele* v. *Louisville and Nashville R.R. Co.*, 323 U. S. 192; *Nixon* v. *Condon*, 286 U. S. 73; *Betts* v. *Easley*, 161 Kans. 459, 169 P. 2d 831. In each of these cases, State initiative and licensing in establishing and maintaining the enterprise led to a holding or implication that the Fifth or Fourteenth Amendments forbid racial discrimination.

Here, indeed, is a case where the State "to some significant extent" in many meaningful "manifestations has been found to have become involved. . . . " *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722.

F. These Convictions Must Be Reversed Since, in Addition to the Foregoing, Alabama Has Failed to Protect Petitioners' Rights to Equal Access to Public Accommodations.

In the preceding sections of this brief, petitioners have established a basis for reversal of their convictions on several grounds: enforcement of a city ordinance requiring racial segregation, buttressed by a massive state segregation policy, state enforcement of private racial discrimination, enforcement of an arbitrary property claim, and elaborate state initiative and involvement in the enterprise and its maintenance. To these grounds for reversal should be added the states' failure to provide equal

protection of the laws to petitioners in their right to equal access to public accommodations. Alabama has failed to provide what the *Civil Rights Cases* assumed the states did provide: "a right to enjoy equal accommodations and privileges" which this Court termed "one of the essential rights of the citizen which no state can interfere with." 109 U. S. at 19.

This Court has recognized that failure or refusal of a state to act can deny the equal protection of the laws. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725; *Terry* v. *Adams*, 345 U. S. 461, 469; *Truax* v. *Corrigan*, 257 U. S. 312; see *Lynch* v. *United States*, 189 F. 2d 476 (5th Cir. 1951); *Catlette* v. *United States*, 132 F. 2d 902 (4th Cir. 1943).

Indeed, it is questionable whether the verbal concept of "state action" in equal protection cases rests on more than a misunderstanding,[43] for the phrase, no state shall deny equal protection, refers even more naturally to state inaction than to state action.

Mr. Justice Woods, a member of the majority of the *Civil Rights Cases*, stated in *United States* v. *Hall*, 26 Fed. Cas. 79, 81 (No. 15,282 1871):

> Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection.

His concurrence with the majority in the *Civil Rights Cases* may, therefore, be explained by his agreement with their

---

[43] See, generally, Mr. Justice Harlan dissenting in *Civil Rights Cases*, 109 U. S. 3, 26-62.

assumption that remedies against the discrimination in those cases existed under state law.

This indeed was a view held by some of the legislators concerned with the scope of the Amendment at or around the time of its passage. For example, Representative Wilson of Indiana in debates on the Enforcement Act of April 20, 1871, 17 Stat. 13, argued that the states were under an obligation to assure equality and that failure to do so was a denial of equal protection:

1. The provisions 'no State shall deny' and 'Congress shall have power to enforce' mean that equal protection shall be provided for all persons.
2. *That a failure to enact the proper laws for that purpose, or a failure to enforce them,* is a denial of equal protection. (Emphasis added.)
3. That when there is such a denial Congress may enact laws to secure equal protection.[44]

Representative Lawrence in debates on the Civil Rights Act of 1875 stated:

> What the State permits by its sanction, having the power to prohibit, it does in effect itself.[45]

Senator Pool in debates on the Enforcement Act of May 31, 1870, 16 Stat. 140, argued that:

> . . . . but to say that it shall not deny to any person the equal protection of the law it seems to me opens up a different branch of the subject. *It shall not deny by acts of omission,* by a failure to prevent its own citizens

---

[44] Cong. Globe, 42nd Congress, 1st Sess., p. 483 (1871).

[45] Cong. Rec., 43d Cong., 1st Sess. 412 (1874).

from depriving by force any of their fellow-citizens of these rights.[46] (Emphasis added.)

This view is endorsed by the opinion in the *Civil Rights Cases*, for that decision was based on the assumption that the states in question would provide remedies securing to their citizens the right of access to places of public accommodation without racial discrimination:

> We have discussed the question presented by the law on the assumption *that a right to enjoy equal accommodations* and privileges in all inns, public conveyances, and places of public amusement, *is one of the essential rights of the citizen which no state can abridge or interfere with* (109 U. S. at 19). (Emphasis added.)
>
> * * * * *
>
> Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the State, and *presumably subject to redress by those laws until the contrary appears?* (109 U. S. at 24). (Emphasis added.)

---

[46] Cong. Globe, 41st Cong., 2d Sess. 3611 (1870).

Other contemporary congressmen also suggested that state inaction may be as culpable as action: In a speech delivered by Representative Bingham of Ohio, the framer of the key phrases in Section One, it was repeatedly stated that the Fourteenth Amendment granted Congress the power to act on individuals and could provide relief against the denial of rights by the states whether by "acts of omission or commission." Appendix to the Cong. Globe, 42d Congress, 1st Sess. 85. Representative Coburn of Indiana said that a state could deny equal protection by failing to punish individuals violating the rights of others. Cong. Globe, 42d Congress, 1st Sess. 459.

Mr. Justice Bradley's entire opinion was concerned with the question whether the Fourteenth Amendment had conferred on Congress the power to regulate the acts of private individuals when, as he presumed, the States were exercising their responsibilities toward the goal of eliminating racial discrimination. While he concluded in the negative, it is extremely doubtful that the result would have been the same if a state had been found to be in effect sanctioning private discrimination by laxity in this regard. See Konvitz & Leskes, *A Century of Civil Rights* 150 (1961); Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 Cornell L. Q. 375, 376; Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 Colum. L. Rev. 149, 184 (1935); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. Pa. L. Rev. 1, 21 (1959).

This case, therefore, is like *Burton v. Wilmington Parking Authority*, 365 U. S. 715, 725:

> [T]he Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. . . . By its inaction . . . the State . . . has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination.

For here in an area in which the State is deeply involved it has both positively and negatively sanctioned the racial segregation which gave rise to this case.

II.

The Decision Below Conflicts With Decisions of This Court Securing the Right of Freedom of Expression Under the Fourteenth Amendment to the Constitution of the United States.

A. The Enforcement of the State and City Segregation Policy and the Interference of the Police Violated Petitioners' Right to Freedom of Expression.

Petitioners were engaged in the exercise of free expression, by verbal and nonverbal requests to the management for service, and nonverbal request for nondiscriminatory lunch counter service, implicit in their continued presence in the dining area when refused service. As Mr. Justice Harlan wrote in *Garner* v. *Louisiana*: "We would surely have to be blind not to recognize that petitioners were sitting at these counters, when they knew they would not be served, in order to demonstrate that their race was being segregated in dining facilities in this part of the country." 368 U. S. at 201. The manner of petitioners' expression was entirely appropriate to the time and place at which it occurred. Petitioners did not shout or obstruct the conduct of business. There were no speeches, picket signs, handbills or other possibly inappropriate forms of expression in the store. Rather they offered to purchase in a place and at a time set aside for such transactions. Their protest demonstration was a part of the "free trade in ideas," *Abrams* v. *United States*, 250 U. S. 616, 630, Holmes, J., dissenting, within the range of liberties protected by the Fourteenth Amendment, even though nonverbal. *Stromberg* v. *California*, 283 U. S. 359 (display of red flag); *Thornhill* v. *Alabama*, 310 U. S. 88 (picketing); *West Virginia State Board of Education* v. *Barnette*,

319 U. S. 624, 633-634 (flag salute); *N. A. A. C. P.* v. *Alabama*, 357 U. S. 44 (freedom of association).

Questions concerning free speech expression are not resolved merely by reference to the fact that private property is involved. The Fourteenth Amendment right to free expression on private property takes contour from the circumstances, in part determined by the owner's privacy, his use and arrangement of his property. In *Breard* v. *Alexandria*, 341 U. S. 622, 644, the Court balanced the "householders' desire for privacy and the publisher's right to distribute publications" in the particular manner involved, upholding a law limiting the publishers' right to solicit on a door-to-door basis. But cf. *Martin* v. *Struthers*, 319 U. S. 141 where different kinds of interests led to a corresponding difference in result. Moreover, the manner of assertion and the action of the State, through its officers, its customs and its creation of the property interest, must be taken into account.

In this constitutional context it is crucial, therefore, that the stores implicitly consented to the continuance of the protest and did not seek intervention of the criminal law. For, this case is like *Garner* v. *Louisiana*, *supra*, where Mr. Justice Harlan, concurring, found a protected area of free expression on private property on facts regarded as involving "the implied consent of the management" for the sit-in demonstrators to remain on the property. In none of the cases at bar did anyone other than the police request petitioners to leave the store. In one pair of cases there was not even a request to leave the dining area. The pattern of police action, obviously, was to arrest Negroes in white dining areas. In no case does it appear that anyone connected with the store called the police or subsequently signed an affidavit or complaint. In each case the police

officer proceeded immediately to arrest the petitioners without any request to do so on the part of anyone connected with the store.

In such circumstances, petitioners' arrest must be seen as state interference in a dispute over segregation at these counters and tables, a dispute being resolved by persuasion and pressure in a context of economic and social struggle between contending private interests. The Court has ruled that judicial sanctions may not be interposed to discriminate against a party to such a conflict. *Thornhill* v. *Alabama, supra; San Diego Bldg. Trades Council* v. *Garmon*, 349 U. S. 236.

But even to the extent that the stores may have acquiesced in the police action a determination of free expression rights still requires considering the totality of circumstances respecting the owner's use of the property and the specific interest which state judicial action supports. *Marsh* v. *Alabama*, 326 U. S. 501.

In *Marsh*, this Court reversed trespass convictions of Jehovah's Witnesses who went upon the privately owned streets of a company town to proselytize, holding that the conviction violated the Fourteenth Amendment. In *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U. S. 793, the Court upheld a labor board ruling that lacking special circumstances employer regulations forbidding all union solicitation on company property constituted unfair labor practices. See *Thornhill* v. *Alabama; supra*, involving picketing on company-owned property; see also *N.L.R.B.* v. *American Pearl Button Co.*, 149 F. 2d 258 (8th Cir. 1945); *United Steelworkers* v. *N.L.R.B.*, 243 F. 2d 593, 598 (D. C. Cir. 1956), reversed on other grounds, 357 U. S. 357. Compare the cases mentioned above with *N.L.R.B.* v. *Fansteel*

Metal Corp., 306 U. S. 240, 252, condemning an employee seizure of a plant. In *People* v. *Barisi*, 193 Misc. 934, 86 N. Y. S. 2d 277, 279 (1948) the court held that picketing within Pennsylvania Railroad Station was not a trespass; the owners opened it to the public and their property rights were "circumscribed by the constitutional rights of those whose use it." See also *Freeman* v. *Retail Clerks Union*, Washington Superior Court, 45 Lab. Rel. Ref. Man. 2334 (1959); and *State of Maryland* v. *Williams*, Baltimore City Court, 44 Lab. Rel. Ref. Man. 2357, 2361 (1959).

In the circumstances of this case the only apparent state interest being subserved by these trespass prosecutions is support of the property owner's discrimination in conformity to the State's segregation custom and policy and the express terms of the City Ordinance. This is all that the property owner can be found to have sought.

Where free expression rights are involved, the question for decision is whether the relevant expressions are "in such circumstances and . . . of such a nature as to create a clear and present danger that will bring about the substantive evil" which the state has the right to prevent. *Schenck* v. *United States*, 249 U. S. . . . 52. The only "substantive evil" sought to be prevented by these trespass prosecutions is the stifling of protest against the elimination of racial discrimination, but this is not an "evil" within the State's power to suppress because the Fourteenth Amendment prohibits state support of racial discrimination. See *Cooper* v. *Aaron*, 358 U. S. 1; *Terminiello* v. *Chicago*, 337 U. S. 1; *Sellers* v. *Johnson*, 163 F. 2d 877 (8th Cir. 1947), cert. denied 332 U. S. 851.

B. The Convictions Deny Petitioners' Right to Freedom of Expression in That They Rest on a Statute Which Fails to Require Proof That Petitioners Were Requested to Leave by a Person Who Had Established Authority to Issue Such a Request at the Time Given.

In the courts below petitioners asserted that the ordinance in question as applied to them denied due process of law secured by the Fourteenth Amendment to the Constitution of the United States in that it did not require that the persons requesting them to leave the dining areas established or, indeed, asserted their authority to make the demands. In none of the ten records before this court did the persons who demanded that petitioners leave first inform petitioners or demonstrate to them that they had authority to request that the petitioners leave the areas in question. Only in one pair of cases (Parker 162, West 192) did the witness say that he "identified" himself. Yet there was no evidence that he claimed authority to order petitioners out of the dining area, or indeed, that the witness possessed such authority. No one ordinarily may be expected to assume that one who tells him to leave a public place, into which the proprietor invited him and in which he has traded, is authorized to utter such an order when no claim of such authority is made.

This is especially true in the case of a Negro seating himself in a white dining area in Birmingham, Alabama—obviously a matter of controversy and on which any stranger, or the police of a city with a segregation Ordinance, might be expected to volunteer strong views. If the statute in question is interpreted to mean that one must leave a public place under penalty of being held a criminal when ordered to do so by a person who later turns out to have been in authority without a claim of authority at the time, it means as a practical matter that one must depart

from a public place whenever told to do so by anyone; the alternative is to risk fine or imprisonment. Such a rule might be held a denial of due process. Cf. *Lambert* v. *California*, 355 U. S. 225. But if such is the rule the statute gives no fair warning. *Winters* v. *New York*, 333 U. S. 507; *Burstyn* v. *Wilson*, 343 U. S. 495; *Saia* v. *New York*, 334 U. S. 558; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568. Absent such notice petitioners surely were entitled to assume that one may go about a public place under necessity to observe orders only from those who claim with some definiteness the right to give them.

Indeed, as a matter of due process of law, if it is the rule that one must obey all orders of strangers to leave public places under penalty of criminal conviction if one uttering the order later turns out to have had authority, petitioners are entitled to more warning of its harshness than the Ordinance's text affirmed. *Connally* v. *General Construction Co.*, 269 U. S. 385; *Lanzetta* v. *New Jersey*, 306 U. S. 451. Otherwise many persons—like these petitioners—may be held guilty of crime without having intended to do wrong. This Court has said however, that

> "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morrissette* v. *U. S.*, 342 U. S. 246, 250.

Morrissette, of course, involved a federal statute as treated in the federal courts. But it expresses the fundamental view that *scienter* ought generally to be an element in criminality. See Sayre, *Public Welfare Offenses*, 33 Columbia L. Rev.

55, 55-6 (1933). The pervasive character of *scienter* as an element of crime makes it clear that a general statute like the ordinance now in question, in failing to lay down a *scienter* requirement, gives no adequate warning of an absolute liability. Trespass statutes like the one at bar are quite different from "public welfare statutes" in which an absolute liability rule is not unusual. See *Morrissette* v. *United States*, *supra*, 342 U. S. at 252-260.

Indeed, the ordinance in question is significantly different from Code of Alabama, Title 14, §426, which at least exculpates those who enter with "legal cause or good excuse" a phrase missing from the Birmingham ordinance. Cf. *Central Iron Co.* v. *Wright*, 20 Ala. App. 82, 101 So. 815; *McCord* v. *State*, 79 Ala. 269; American Law Institute, Model Penal Code, Tentative Draft No. 2, §206.53, Comments.

On the other hand however, if Alabama were to read a *scienter* provision into this ordinance for the first time—which it has failed to do although the issue was squarely presented in these ten cases—the lack of the necessary element of guilt, notice of authority, patent on the face of all ten records, would require reversal under authority of *Garner* v. *Louisiana*, *supra*; *Thompson* v. *City of Louisville*, 362 U. S. 199.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below should be reversed.

Respectfully submitted,

CONSTANCE BAKER MOTLEY
JACK GREENBERG
10 Columbus Circle
New York 19, N. Y.

ARTHUR D. SHORES
PETER A. HALL
ORZELL BILLINGSLEY, JR.
OSCAR W. ADAMS, JR.
J. RICHMOND PEARSON
Birmingham, Alabama

Attorneys for Petitioners

LEROY CLARK
WILLIAM T. COLEMAN, JR.
MICHAEL MELTSNER
WILLIAM R. MING, JR.
JAMES M. NABRIT, III
LOUIS H. POLLAK
Of Counsel

FILED
OCT 1962

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 66.

JAMES GOBER, JAMES ALBERT DAVIS, ROY HUTCHINSON, ROBERT J. KING, ROBERT PARKER, WILLIAM WEST, ROBERT D. SANDERS, ROOSEVELT WESTMORELAND, JESSIE WALKER, WILLIE J. WILLIS,
Petitioners,

vs.

CITY OF BIRMINGHAM,
Respondent.

On Writ of Certiorari to the Court of Appeals of Alabama.

BRIEF FOR RESPONDENT.

WATTS E. DAVIS,
WILLIAM C. WALKER,
EARL McBEE,
600 City Hall Building,
Birmingham, Alabama,
Attorneys for Respondent.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477

INDEX.

	Page
Statement	1
Facts common to each case	5
Summary of argument	6
Argument	9
I. Statutory provisions involved	9
II. Constitutional rights were not denied petitioners in State Courts	11
A. Constitutional objections raised by motion to strike the complaint were properly overruled by State Court	11
B. Demurrers filed by petitioners were properly overruled in State Court	14
C. Constitutional objections raised by motion to exclude evidence were properly overruled by State Court	16
D. State Court did not commit error in overruling motion for new trial to the denial of petitioners' constitutional rights	27
III. Fourteenth Amendment not involved in this controversy	29
Conclusion	30

Cases Cited.

Alabama v. Adams, Rowe & Norman, 216 Ala. 403, 113 So. 265 27

Allen-Bradley Local, etc. v. Wisconsin Employment Relations Board, 315 U. S. 740, at page 746, 62 S. Ct. 820, at page 824, 86 L. Ed. 1154 9

American Surety Co. v. Hooker, 36 Ala. App. 39, 58 So. 2d 469 ..... 28, 29
Browder v. Gayle, 142 F. Supp. 707 ..... 7, 21, 23, 24
Brown v. City of Fairhope, 265 Ala. 596, 93 So. 2d 419 14
Butler v. Pennsylvania, 10 Howard 402, 414, 13 L. Ed. 472 12
Byrum v. Pharo, 240 Ala. 564, 200 So. 622 12
Deslandes v. Scales, 187 Ala. 25, 28, 65 So. 393 15
Dorough v. Alabama Great So. R. Co., 222 Ala. 365, 128 So. 602 17
Ellis v. City of Sylacauga, 36 Ala. App. 687, 63 So. 2d 33 17
Ex Parte Messer, 228 Ala. 113, 152 So. 244, 245 17
Fiorella v. City of Birmingham, 35 Ala. App. 384, 48 So. 2d 761, cert. den., 254 Ala. 515, 48 So. 2d 768, cert. den., 71 S. Ct. 506, 340 U. S. 942, 95 L. Ed. 680 ..... 17, 27
Garner v. Louisiana, 368 U. S. 157 19
Garner v. State of Louisiana, 82 S. Ct. 248 (1961) 6, 7, 10, 11, 33
Gulf, M. & N. R. Co. v. Weldy, 8 So. 2d 249, 193 Miss. 59, 144 A. L. R. 930 10
Hill v. Mendenhall, 21 Wall. 453, 88 U. S. 453, 22 L. Ed. 616 20
Jackson v. City of Mobile, 33 Ala. App. 95, 30 So. 2d 40 17
Kalas v. McMahon, 36 Ala. App. 238, 54 So. 2d 322 14
Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO, v. Missouri, 80 S. Ct. 391, 361 U. S. 363, 4 L. Ed. 2d 373 ..... 9, 30
Mazer v. Brown, 259 Ala. 449, 66 So. 2d 561, 565 17
Mitchell v. Wright, C. C. A. Ala., 154 Fed. 2d 924, 926, 927, cert. den., 67 S. Ct. 96, 329 U. S. 733, 91 L. Ed. 633 20

Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 302, 57 S. Ct. 724, 729, 81 L. Ed. 1093 10

Smith v. State, 13 Ala. App. 411, 69 So. 406 17

Snow v. Allen, 227 Ala. 615, 151 So. 468 17

Southern Indemnity Ass'n v. Hoffman, 16 Ala. App. 274, 77 So. 224 15

Standard Oil Co. v. City of Marysville, Kan., 279 U. S. 582, rehearing denied, 282 U. S. 797 22

State v. Howze, 247 Ala. 564, 25 So. 2d 433 16

Taylor v. City of Birmingham, 35 Ala. App. 133, 45 So. 2d 53 13

Union Central Life Insurance Co. v. Griffin, 232 Ala. 254, 167 So. 321 15

United States Fidelity and Guaranty Co. v. Town of Dothan, 174 Ala. 480, 56 So. 953 14

Williams v. Howard Johnson, 268 F. 2d 845 ..... 7, 21, 24

Wyatt v. Birmingham, 37 Ala. App. 579, 72 So. 2d 735 ..... 28, 29

Statutes and Rules Cited.

Code of Alabama, 1940:

Title 7, Section 225 ..... 10, 19

Title 7, Section 236 ..... 6, 15, 16

Code of the City of Birmingham:

Section 369 ..... 6, 9

Section 824 ..... 13, 14

Section 1436 ..... 1, 21

Rules of Practice in Supreme Court, Rule 9 (10), Title 7, Appendix 28, 29

Textbook Cited.

20 Am. Jur., Sec. 799 27

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 66.

JAMES GOBER, JAMES ALBERT DAVIS, ROY HUTCHINSON, ROBERT J. KING, ROBERT PARKER, WILLIAM WEST, ROBERT D. SANDERS, ROOSEVELT WESTMORELAND, JESSIE WALKER, WILLIE J. WILLIS,
Petitioners,

vs.

CITY OF BIRMINGHAM,
Respondent.

On Writ of Certiorari to the Court of Appeals of Alabama.

BRIEF FOR RESPONDENT.

STATEMENT.

As set forth in petitioners' statement (pp. 4, 5), the petitioners were all charged and convicted below for having trespassed after warning in violation of a city code provision (Sec. 1436).

While a great portion of the record in each of the cases is consumed with details concerning the respective peti-

tioners going upon the premises of the various department stores, the gravamen of the offense charged in each instance was that the petitioners remained on the premises described in the respective complaints after being warned not to do so.

Gober and Davis:

Mr. Gottlinger, Controller for Pizitz department store, testified (R. 21, 23) that he was present and heard Mr. Dick Pizitz, who was the assistant to the president of the store, converse with the two petitioners, Gober and Davis. They were told by Mr. Pizitz that they could not be served. One of petitioners made "a statement to the effect that we should call the police" (ibid); they did not leave when Mr. Pizitz asked them to leave (R. 23) and "remained until the officers came" (R. 24).

Detective C. L. Pierce testified for the City that he had a conversation with Davis and Gober the day following their arrest (R. 28). He testified he was told by one of the petitioners that both of them had attended a meeting at Rev. Shuttlesworth's house; that "volunteers were asked for and both Davis and Gober said they volunteered to participate in the sit-down demonstration and that they were assigned stores to go to at a certain time and they said they did agree" (R. 40). Both volunteered and were assigned to go to Pizitz; and that they remained there until the officers arrested them (ibid); that they "made no effort and did not intend to leave until they were arrested, and that the purpose of that thing was to stay there until they were arrested. And they stated when they sat down they were denied service there and asked to leave" (ibid).

Police Officer Martin was told by a superior officer to go to Pizitz store because of a disturbance there (R. 20).

Upon arrival at Pizuz store there were people in the store talking to his superior officers and he was ordered by his immediate superior to make the arrest (R. 20).

Petitioners did not ask the identity of the person who told them to leave (R. 45).

Hutchinson and King:

Officer Martin received a call to go to Loveman's department store (R. 107). On arrival he noticed a rope had been tied from one post to another post at the eating place with a sign on it "stating closed" (ibid). He was told by Officer J. L. Holt to go with him to Loveman's (ibid). Someone from Loveman's informed his superior officers that the two boys had been told to leave (R. 108).

A disturbance was caused because the two Negroes were sitting there (R. 113).

On three occasions the store detective announced within three feet of the petitioners that the place was closed. The manager of the cafeteria hung a sign up indicating "the place was closed" (R. 117). The petitioners remained until the police arrived, which was about five minutes later (ibid). The petitioners remained seated and all of the white people got up and left (R. 118).

Parker and West:

Mrs. Gibbs, store detective at Newberry's, identified herself to these two petitioners and "told them they would have to leave (R. 162). They said they were not leaving, that they were not violating any law" (R. 163).

Mr. Stallings, assistant store manager, told the petitioners, "You know you can't do this" (R. 164). One of them said, "Well, we have our rights" (Ibid). The petitioners kept sitting there (ibid).

Sanders and Westmoreland:

Officer Caldwell testified for the City that he had orders or received a call to go to Kress on the morning of March 31, 1960 (R. 209). He observed that the lunch room was closed and that the lights were out (ibid); he observed Westmoreland and Sanders "sitting there" (ibid); the manager of the lunch counter told the officer he had turned the lights out and closed the counter, and "that they couldn't be served" (ibid).

The manager of the luncheon counter approached the two petitioners and informed the boys that the place was closed; he put up a closed sign and told them, "we couldn't serve them and they would have to leave" (R. 211). The boys moved to another bay or area of the luncheon counter (ibid). He approached them again and said, "Boys, you will have to leave * * * the bay is closed. We are closing" (R. 212). One of the boys said, "Well, we have our rights."

The luncheon counter manager summoned the manager of the store, who "asked them to leave the store" (ibid).

Walker and Willis:

Officer Casey received a call over his radio to go to Woolworth's store (R. 252). He contacted Mrs. Evans, the manager of the lunch room counter (ibid) and she stated she "had told the boys to leave, that the place was closed", and a second time she directed her conversation to the defendants and "told them it was closed and that they would have to leave, she would not serve them" (R. 252, 253).

The officer "took the complaint from Mrs. Evans that she wanted the boys out of the store, that the lunch room was closed," and arrested them (ibid).

FACTS COMMON TO EACH CASE.

Petitioners, under this topical heading of their brief, paragraph three (p. 15), charge that "it appears" that petitioners were arrested without the request of any agent of the stores.

It might be noted at this point that **no issue was raised by petitioners' pleadings** as to how the arrests were initiated. The plea of the defendants was "not guilty" (see **Gober-Davis**, R. 10). Since the manner of the arrest was not in issue in the controversy under the pleadings, the respondent here was neither called upon nor prepared to negative this matter, which is raised for the first time in the entire proceedings before **this Court**.

In paragraph four, petitioners state that there is no evidence "that the person requesting petitioners to leave the lunch area identified himself". This, too, was not an issue in the trial below for the reason stated immediately above.

What, in fact, the petitioners are proposing in both paragraph three and four is that this Court substitute itself for the trial court and permit the petitioners to re-try the case under a different set of pleadings and issues. The matters complained of here were not injected into the trial below, nor was any assignment of error in the state appellate court predicated upon the propositions now asserted by petitioners.

SUMMARY OF ARGUMENT.

I.

Petitioners cannot retry their cases before this Court.

The only issue before the state trial court was whether or not the petitioners had trespassed as charged in the complaint filed by the respondent. Petitioners' motions to strike the complaint were held to be inapplicable. The demurrers filed in each case were overruled on the basis that each of same was too general in nature, as prohibited by Section 236 of Title 7, **Code of Alabama, 1940**. Those grounds assigning Constitutional questions were ruled to be speaking demurrers. Evidence was then taken on the issue of whether or not petitioners had committed the trespass as charged.

The alleged Section 369 of respondent's Code, which purports to require restaurant operators to construct certain partitions and entrances, was in no way involved in the controversy as charged by petitioners. Petitioners did not request the court to take judicial notice of any such ordinance, no such ordinance was identified by petitioners, no such ordinance was introduced in evidence, no exception was taken to the ruling of the trial court preventing an employee of a store from testifying as to whether he had knowledge of the ordinance, and no assignment of error before the state appellate court in any way related to the existence of such alleged ordinance. Nothing in the **pleadings** before the trial court raised any issue relevant to the alleged ordinance. As noted in **Garner v. State of Louisiana**, 82 S. Ct. 248, Mr. Chief Justice Warren emphasized that the taking of judicial notice of the ordinance would be "to turn the doctrine into a pretext for dispensing with a trial." To rule otherwise would place a burden upon the trial court of acting as counsel for the

person in whose favor an ordinance might operate, by causing it to be alert at all times to all laws and ordinances and to invoke them on any occasion where same might be of benefit to parties in litigation.

II.

The pleadings filed by petitioners in the cases before the court here, as heretofore outlined, were properly due to be overruled under both the applicable sections of the Alabama Code and the decisions of Alabama's Supreme Court interpreting the statutes.

Upon completion of the evidence in each of the cases, petitioners filed similar motions to exclude the evidence. None of the grounds of the motions to exclude the evidence attacked the sufficiency of the evidence, but instead dealt with the propositions that the various stores involved were public property or operated by the public; that thereby the stores became an arm of the state and therefore, as such, could not partially segregate themselves. The Alabama Court of Appeals ruled that, under **Browder v. Gayle**, 142 F. Supp. 707, the Fourteenth Amendment guaranteed the stores this right, and further noted that **Williams v. Howard Johnson**, 268 F. 2d 845, was authority for the fact that the stores could deny their eating facilities to members of the Negro race, where the restaurant was not a part of interstate commerce.

The petitioners emphasized repeatedly in their motions to exclude the evidence that racial discrimination "was in accordance with a policy, custom and usage" of the various stores.

Your respondent submits that in keeping with admissions of petitioners and the issues in controversy as established by the pleadings, the trial court was not in error in its conviction of petitioners.

Counsel for the petitioners conceded that the only issue involved was whether "some trespass after warning" had been committed (R. 25, 26).

III.

Respondent submits that no Constitutional rights were denied to petitioners by the state court. The Fourteenth Amendment does not reach to demonstrations conducted on private property over the objection of the owner, as noted by Mr. Justice Harlan in **Garner**, supra.

The actions of the petitioners in the various stores did not encompass the question of free speech. Their actions, as shown by the record, clearly indicate that they sought only one objective, namely, that of being arrested in order to precipitate litigation over the question of the **custom and policy of the various stores.** The privilege of resort to litigation was fully accorded petitioners.

ARGUMENT.

I.

STATUTORY PROVISIONS INVOLVED.

It is contended by petitioners that "Section 369 (1944)" of the respondent's city code is involved in the case now before the Court.

The alleged ordinance requires a restaurant operator to maintain certain partitions and entrances for white and colored persons in eating establishments (pp. 2, 10).

Assuming such to be true, the propriety of suggesting the ordinance for the **first time** in this Court is completely out of harmony with past decisions of this Court. In the case of **Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO v. Missouri**, 80 S. Ct. 391, 361 U. S. 363, 4 L. Ed. 2d 373, this Court said, "Constitutional questions will not be dealt with abstractly. * * * They will be dealt with only as they are appropriately raised upon a record before us. * * * Nor will we assume in advance that a State will so construe its law as to bring it into conflict with the federal Constitution or an act of Congress." The foregoing quote was adopted from the earlier decision of this Court in **Allen-Bradley Local, etc. v. Wisconsin Employment Relations Board**, 315 U. S. 740, at page 746, 62 S. Ct. 820, at page 824, 86 L. Ed. 1154.

The record before this Court clearly shows that petitioners have never placed in issue before the **state courts** the matter of any such ordinance requiring separation of the races, nor addressed themselves to the question in any manner before the state appellate court.

Petitioners argue here, but never below, that an Alabama statute requires that ordinances of the City of Bir-

mingham be judicially recognized (p. 23*). Respondent agrees that its ordinances are judicially noticeable, but only in appropriate instances.

Bearing in mind that **judicial notice is a rule of evidence** rather than a **rule of pleading, Gulf, M. & N. R. Co. v. Weldy**, 8 So. 2d 249, 193 Miss. 59, 144 A. L. R. 936, the suggested ordinance, to have served some defensive purpose (see **Code of Alabama (1940), Title 7, Section 225**) would of necessity have had to be incorporated into a plea or answer to the complaint. If then, after the supposed ordinance was properly made an issue in the trial below petitioners sought judicial notice by the Court, rules of **evidence** making it unnecessary to prove by evidence the existence of such an ordinance, would have been entirely applicable. The record before the Court clearly demonstrates, of course, that petitioners did not place the question of such ordinance before the lower court, nor was any **assignment of error** directed to the proposition before the state appellate court (R. 41, 42).

This question is not a new one for this Court. In the recent case of **Garner v. State of Louisiana**, 82 S. Ct. 248 (1961), Mr. Chief Justice Warren, in delivering this Court's opinion, stated, "There is nothing in the records to indicate that the trial judge did in fact take judicial notice of anything. To extend the doctrine of judicial notice to the length pressed by respondent * * * would be 'to turn the doctrine into a pretext for dispensing with a trial' ", citing **Ohio Bell Telephone Co. v. Public Utilities Commission**, 301 U. S. 292, 302, 57 S. Ct. 724, 729, 81 L. Ed. 1093. The foregoing opinion further recited the inherent danger of a court taking upon itself the prerogative of unsolicited judicial notice in the absence of inserting same into the record by saying a party, "* * * is deprived of an opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon."

In light of the **Garner opinion**, supra, and in light of the fact that the record discloses nowhere that the court below, either upon solicitation of counsel or otherwise, took or refused to take judicial notice of any such ordinance, and, further, that no assignment of error before the state appellate court made any reference whatever to the existence of such an ordinance, thereby affording the state appellate court an opportunity to rule on any question relating to the validity of the ordinance, your respondent respectfully urges that no constitutional or other questions dependent upon such an ordinance are properly before this Court for review. To rule otherwise would completely dispense with the need for filing pleadings since the Court would be required, under petitioners' theory, to at all times be alert to every ordinance of the City of Birmingham and to place them in issue whenever same might be applicable, thereby placing the burden upon the Court to, in effect **act as counsel** for the person in whose favor the ordinance might operate.

II.

CONSTITUTIONAL RIGHTS WERE NOT DENIED PETITIONERS IN STATE COURTS.

A. Constitutional Objections Raised by Motion to Strike the Complaint Were Properly Overruled by State Court.

The sole question in the instant case is whether the **state court erred** so as to deprive the petitioners of certain of their Constitutional rights. The petitioners filed extensive pleadings in the state court, stating in detail the Constitutional questions which they contended were at issue in the case. The pleadings in each case were similar, with one exception.[1] The overruling of all of the plead-

[1] No written motions to exclude the evidence were filed on behalf of William West, Roosevelt Westmoreland and Willie J. Willis.

ings filed by petitioners, by the trial court, constituted the first four of the five errors assigned by petitioners to the Alabama Court of Appeals (R. 56, 87, 123, 142, 177, 192, 219, 234, 261, 276). The fifth error assigned dealt with the admissibility of evidence and in no way dealt with a Constitutional question. As noted in the opinion of the lower court (see **Gober** case, R. 64, last paragraph), petitioners did not argue this assignment of error (5), and consideration of same was therefore pretermitted by the state court of appeals.

Petitioners' pleadings consisted of a motion to strike the complaint (R. 3, 74, 94, 130, 146, 184, 196, 226, 238, 268); demurrer (R. 4, 75, 95, 131, 147, 185, 197, 227, 239, 269); motion to exclude the evidence (R. 6, 77, 97, 133, 148, 199, 241) [no motion to exclude the evidence was filed on behalf of William West, Roosevelt Westmoreland and Willie J. Willis]; and motion for new trial (R. 12, 83, 103, 139, 154, 189, 205, 231, 247, 273).

The **motion to strike** contains six grounds, numbered 1 through 6, in support of the motion. The overruling of the motion was assigned as error 1 by petitioners on appeal in the state court. Grounds 3, 4 and 5 are the only grounds which endeavored to raise Constitutional points. Ground 3 says, in substance, that the **trespass after warning ordinance** of the City of Birmingham is "an abridgement of the freedom of assembly, speech and liberties * * * ."

Foregoing, for the moment the fact that a **motion to strike** is not a proper method of testing the validity or legal sufficiency of the City's complaint, **Taylor v. City of Birmingham**, 35 Ala. App. 133, 45 So. 2d 53; **Byrum v. Pharo**, 240 Ala. 561, 200 So. 622, the Constitutional point raised is hardly well taken.

This Court, in **Butler v. Pennsylvania**, 10 Howard 402, 414, 13 L. Ed. 472, stated, "Accordingly it has been repeat-

edly said by this court that to pronounce a law of one of the sovereign states of this union to be a violation of the constitution is a solemn function, demanding the gravest and most deliberate consideration; and that a law of one of the states should never be denominated if it can upon any other principle be correctly explained."

Since the Fourteenth Amendment protects one in his ownership of property, it hardly seems consistent for petitioners to argue that a state or a municipal body politic is doing an unconstitutional act when it affords one a local remedy for the protection of his property. Petitioners' argument that the trespass ordinance violates free speech protection afforded by the Fourteenth Amendment would strike down all laws having to do with holding one for ransom, extortion, blackmail, bad checks, plus an abundance of other offenses. Their argument as to free assembly, if sustained, would make lawful all riots, all conspiracies to commit a crime, and all crimes committed wherein more than one person participates, since each requires an assembly of persons. Such a contention as urged here by petitioners could well lead to endless absurdities as well as a condition of complete chaos.

Ground 4 of the motion to strike contends that the trespass ordinance "as applied to the defendant, constitutes an abridgement of privileges and immunities guaranteed defendant" in violation of the Fourteenth Amendment.

The motion to strike does not specify the "privileges and immunities" contemplated, and respondent does not deem it appropriate to enter upon conjecture on the subject.

Ground No. 5 of the motion to strike asserts that **Section 824** of respondent's code "as applied to this defendant, a Negro citizen of the United States, constitutes a

denial of due process and equal protection of the law" in violation of the Fourteenth Amendment. **Section 824** of the City Code deals with aiding, abetting or inciting another to violate a law or ordinance of the City, and is in no way involved in the instant case involving trespass.

B. **Demurrers Filed by Petitioners Were Properly Overruled in State Court.**

Petitioners filed a similar demurrer in each case, each containing eight grounds. The demurrer in each case was overruled and the overruling of same was assigned as error 2 in each case on appeal to the Alabama Court of Appeals (see Gober, R. 56).

Only grounds numbered 4, 5, 6, 7 and 8 endeavored to raise federal Constitutional questions.

Ground 4 of the demurrers says, in substance, that the trespass ordinance "as applied to this defendant is invalid" and violates the First and Fourteenth Amendments to the Constitution of the United States; ground 5 says the same ordinance "as applied to this defendant" deprived petitioner of free speech and free assembly. These grounds raise the identical points raised by petitioners' motion to strike the complaint in grounds 3 and 4 respectively, which have already been discussed, except that in demurrers petitioners say that the trespass ordinance is defective "as applied to this defendant."

It necessarily follows that since the ordinance did not show on its face its unconstitutional effect, if any, upon "**this** defendant", the demurrer became a speaking demurrer, and thereby due to be overruled by the trial court. **Brown v. City of Fairhope**, 265 Ala. 596, 93 So. 2d 419; **Kalas v. McMahon**, 36 Ala. App. 238, 54 So. 2d 322; **United States Fidelity and Guaranty Co. v. Town of Dothan**, 174 Ala. 480, 56 So. 953.

Ground 6 of the demurrers says the ordinance set forth in the City's complaint "as applied to this defendant" deprived him of due process because "* * * it is so vague * * *"; ground 7 of the demurrers urges that "as applied to this defendant" the ordinance is an abridgement of privileges and immunities protected by the Fourteenth Amendment. Neither ground 6 nor 7, or any other ground of the demurrers for that matter, purported to enlighten the court as to how the ordinance on its face deprived petitioners of their Constitutional guaranties. Ground 8 asserted that the trespass ordinance denied equal protection "as applied to this defendant", and was due to be overruled as a speaking demurrer.

By way of summary, the Constitutional defects in the trespass ordinance are asserted to be that the ordinance "violates" the Fourteenth Amendment (ground 4); that it abridges free speech and assembly (ground 5); that the ordinance is unconstitutionally vague (ground 6); that it constitutes an "abridgement of privileges and immunities" (ground 7); and that the ordinance deprives the defendant of due process (ground 8).

The **Code of Alabama 1940**, Section 236 of Title 7, states that, "No demurrer in pleading can be allowed except as to matters of substance, which the party demurring **specifies** (emphasis supplied); and no objection can be taken or allowed which is not distinctly stated in the demurrer." The foregoing code section has been uniformly held to be one "designed to prevent vague and indefinite grounds of demurrer". "The Supreme Court has long maintained and enforced a very strict observance of the rule announced in this section." **Deslandes v. Scales**, 187 Ala. 25, 28, 65 So. 393; **Union Central Life Insurance Co. v. Griffin**, 232 Ala. 254, 167 So. 321; **Southern Indemnity Ass'n v. Hoffman**, 16 Ala. App. 274, 77 So. 224.

State v. Howze, 247 Ala. 564, 25 So. 2d 433, states that "this (Code) section does away with a general demurrer at law."

The demurrers make not the slightest pretense at revealing how the ordinance in question denied Constitutional guaranties to the petitioners. Notwithstanding that general demurrers are not sustainable under Alabama law, it is difficult to appreciate petitioners' theory that one may use the premises of another as an arena for a public pronouncement of his cause, over the protest of the owner. The trespass ordinance is in no way concerned with the right to assemble or to speak freely, any more so than are laws that punish riots and unlawful conspiracies. Likewise, nothing **on the face of the ordinance** tends in any manner to indicate that one accused of its violation will be deprived of due process or equal protection. If such be a fact, petitioners did not see fit to specify the **matter of substance** in the ordinance which deprived them of their Constitutional guaranties as required by **Title 7, Section 236, Code of Alabama, 1940.**

C. **Constitutional Objections Raised by Motion to Exclude Evidence Were Properly Overruled by State Court.**

Following the overruling by the trial court of petitioners' demurrers in each case, evidence was heard, and upon the completion of same petitioner filed similar written motions to exclude the evidence (see Gober, R. 6) in each case except that of William West, Roosevelt Westmoreland and Willie J. Willis. The motions were overruled in each of the cases filed, and the overruling of same was assigned as error to the state appellate court as ground 3.

Of course, the first question to be determined is whether a **motion to exclude the evidence** is reviewable on appeal to the Alabama Appellate Court.

"It is well settled that the rules and principles of the law of evidence applicable to civil proceedings are applicable to **quasi criminal proceedings.**" **Ex Parte Messer**, 228 Ala. 143, 152 So. 244, 245; **Smith v. State**, 13 Ala. App. 411, 69 So. 406.

It is uniformly held in Alabama that "an appeal from a conviction for violation of a city ordinance is **quasi criminal**, and subject to the rules governing civil appeals. **Fiorella v. City of Birmingham**, 35 Ala. App. 384, 48 So. 2d 764; **cert. den.**, 254 Ala. 515, 48 So. 2d 768; **cert den.**, 71 S. Ct. 506, 340 U. S. 942, 95 L. Ed. 680; **Ellis v. City of Sylacauga**, 36 Ala. App. 687, 63 So. 2d 3[illegible]; **Jackson v. City of Mobile**, 33 Ala. App. 95, 30 So. 2d 40[illegible].

It has also been uniformly ruled in Alabama that "In civil cases, such a motion (to exclude the evidence) has been condemned by this Court in so many cases here decided that we deem it unnecessary to collate same. The trial court will not be reversed for refusing such a motion." **Snow v. Allen**, 227 Ala. 615, 151 So. 468; **Dorough v. Alabama Great So. R. Co.**, 222 Ala. 305, 128 So. 602. Motion for the **affirmative charge** is the "proper method and the motion to exclude the evidence * * * is inappropriate in a civil case as this court has held many times". **Mazer v. Brown**, 259 Ala. 449, 66 So. 2d 561, 565.

It cannot but be apparent from the foregoing decisions that on appeal from the City's Recorders Court to the Circuit Court the sit-down cases were **quasi-criminal**; that they were subject to **civil rules** as distinguished from criminal rules; and, a motion to exclude the evidence is not the proper method to attack the evidence, but, to the contrary, a motion for the **affirmative charge** is the only means by which the evidence or lack of evidence may be impugned on appeal to the state's appellate courts.

Your respondent feels it worthy of this Court's attention to note that the so-called "motion(s) to exclude the

evidence" are not in fact what their title would indicate. They do not move the court to afford petitioners any relief whatever; they seek no action or remedy from the court. They contain simply a documentation of supposed law and fact, and never once suggest that the evidence is not sufficient to sustain the verdict, assuming, for the sake of argument, these to be proper cases for the filing of such a motion.

Assuming for the moment that a motion to exclude the evidence has not been condemned in so many Alabama decisions that the Alabama Supreme Court "deem(s) it unnecessary to collate same", what, if any, merit is found in the motion?

The first ground attacks the "complaint" (see **Gober**, R. 6), **and not the evidence**, by stating the complaint "is invalid" (ibid). Only a demurrer could serve this function.

Ground 2 asserts substantially that the evidence offered against the defendant established that defendant was "in peaceful exercise of Constitutional rights to assemble with others for the purpose of speaking and protesting against the practice, custom and usage of racial discrimination in Pizitz"[2] (R. 7).

The petitioners contend in this ground that they may assemble upon the premises of another over his protest for purposes of making known their dislike of the owner's racial policy. Your respondent sees little legal merit in the fact that the property owner's racial policy may be the subject of petitioners' distaste. While the subject of racial discrimination in many areas has great emotional appeal, your respondent does not feel that a cause with

[2] In the motion to exclude the evidence in the Gober case (R. 6, 7, 8), "Pizitz" department store is charged with exercising racially discriminatory practices. The names of the different stores involved are substituted in the remaining cases.

considerable appeal justifies a trespass any more than one with little or no appeal. As was pointed out by Mr. Justice Harlan, in **Garner v. Louisiana**, 368 U. S. 157, "This is not to say, of course, that the Fourteenth Amendment reaches to demonstrations conducted on private property over the objection of the owner (as in **Briscoe**) just as it would not encompass verbal expression in a private home if the owner has not consented."

However, notwithstanding the merits or demerits of the foregoing proposition, this ground of the motion to exclude the evidence in no way attacks the sufficiency of the evidence, nor does it relate to any matter defined within the pleadings of the instant case.

Ground 3 of the motion to exclude the evidence, in brief, states that the defendant and others sought to protest "in public places the refusal of the preponderant number of stores, facilities and accommodations open to the public in Birmingham, Alabama to permit defendant, a Negro", to enjoy access to said stores as afforded members of other races; also, that prosecuting witnesses and arresting officers were attempting to enforce this discriminatory policy of the stores (R. 7).

It must be remembered that petitioners filed no special plea to the complaint filed by the City. The **Alabama Code of 1940, Title 7, Section 225**, says, in part, as follows: "The defendant may plead more pleas than one without unnecessary repetition; and, if he does not rely solely on a denial of the plaintiff's cause of action, **must plead specially the matter of defense**" (Emphasis supplied). A search of the record will reveal that **no plea** was filed by petitioners setting forth any matter of defense as permitted by the foregoing section of the state code. The issue, in each case, **in the absence of a plea**, became a simple denial. Petitioners, for reasons best known to them, elected not to have the issues framed along the line of

state action or other Constitutional grounds now urged before this Court. State action, not being an issue defined by the pleadings in the case, could not be a proper ground upon which to attack the **sufficiency of the evidence** either in a motion for the affirmative charge, or a motion to exclude the evidence when filed under appropriate circumstances. It is **fundamental** that the issues to be tried by a court are those which the pleadings leave in dispute. As noted in **Mitchell v. Wright**, C. C. A. Ala., 154 Fed. 2d 924, 926, 927; **cert. den.**, 67 S. Ct. 96, 329 U. S. 733, 91 L. Ed. 633, the court stated, "The office of pleading is to inform the court and the parties of the facts in issue; the court, that it may declare the law; and the parties, that they may know what to meet by their proof." This principle is laid down in keeping with the decision of this Court in **Hill v. Mendenhall**, 21 Wall. 453, 88 U. S. 453, 22 L. Ed. 616.

In the instant cases the only issue in dispute before the trial court was whether or not the defendant below had committed the act charged in the complaint. After the evidence was fully presented, there still was no other issue before the court. The plaintiff under the state of pleadings in the trial court, could not conceivably have been called upon to anticipate and negative by proof all of the matters which defendants below might **subsequently** raise in the nature of a defense to the complaint charged. Petitioners had every opportunity to formulate the issues to be tried. This privilege was exclusively theirs and it must be assumed they exercised it after due deliberation. Petitioners were represented by five able counsel who were particularly expert in matters akin to those in the instant cases. If their choice of issues was unwise, and it is not suggested that it was, the responsibility can hardly be laid upon the state court.

In any event, the respondent claims no responsibility for the discriminatory practices of the "preponderant

number of stores * * *" (R. 7) situated in its City; nor, was the City required (or prepared) under the pleadings to substantiate by affirmative evidence that this was true or that the action of its police officers was in response to information received by telephone or otherwise, from persons witnessing the offenses.

Ground 4 of the motion to exclude the evidence (R. 7, 8), similarly to most other grounds set forth in same, reiterates that the complaint filed by respondent charges the defendant with "trespass upon land after being forbidden to enter", and neglects to note that the **trespass after warning** feature of the ordinance is the gravamen of the offense, as a most casual review of the record will reveal. What is hoped to be gained by petitioners in this respect is not known, but your respondent deems it useful to note.

This ground (R. 7, 8), as many others likewise do, points out that "Pizitz" had a "racially discriminatory practice", and that "under color of law" the defendant was arrested "to enforce this racially discrimmatory policy" in violation of the Fourteenth Amendment.

Whether Pizitz had a right to consider racial involvements in its policy has been previously decided affirmatively in **Browder v. Gayle**, 142 F. Supp. 707; and in **Williams v. Howard Johnson**, 268 F. 2d 845, unless it be established that the eating facility was one engaged in interstate commerce.

As to the proposition of the City acting under "color of law", it appears to your respondent that Section 1436 of respondent's Code has not been shown by the record to be other than a duly adopted law of the respondent city.

As to the proposition that the arrest was made to assist Pizitz in its racial policy, from aught that appears in the

record in these cases the respondent endeavors to enforce its trespass ordinance whether or not it may in some instances coincide with the policy of certain stores.

Ground 5 of the motion (R. 8) states that the trespass ordinance "is unconstitutional on its face by making it a crime to be on **public property** (emphasis supplied) after being asked to leave" at the whim of some individual "in that said statute does not require that the person making the demand to leave present documents or other evidence of possessory right sufficient to apprise defendant of the validity of the demand to leave * * *."

Respondent suspects that petitioners are aware that the record is barren of any evidence that the stores involved were property belonging to the "public".

It needs not repeating that an attack upon what appears on the face of the ordinance, should properly be served by appropriate demurrer addressed to the complaint.

It would appear that the only "document" which might meet petitioners' criterion for sufficiently apprising a trespasser of a valid demand to leave would be an abstract of title to the land involved, in addition to a copy of the contract between the owner or lessee of the property and his agents or officials. Your respondent feels that this is a matter properly lying within the discretion of the legislative body enacting the ordinance. In **Standard Oil Co. v. City of Marysville**, Kan., 279 U. S. 582, rehearing denied, 282 U. S. 797, this Court stated: "Where legislative action is within scope of the police power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for that of the legislative body on which rests the duty and responsibility of decision."

It might well be argued, if a person other than an agent or official of the store involved had in fact made the re-

que t to leave, that the ordinance had not been violated; but petitioners make no such contention, and this, presumably, because in each case the evidence was clear that an official of the store, and not some stranger with a "whim", made the request.

Ground 6 of the motion simply states that the trespass ordinance (Section 1436) is unconstitutional because "it makes it a crime to be on property open to the public after being asked to leave, because of race or color."

The state appellate court's opinion (R. 64) states, "It is fundamental, and requires no citation of authority, that the grantor of a license, which has not become coupled with an interest, may revoke the license at will"; also, "As stated in Martin v. Struthers, 319 U. S. 147, 63 S. Ct. 862, 87 L. Ed. 1313: 'Traditionally the American law punishes persons who enter onto the property of another after having been warned to keep off.'"

The state appellate court cited **Browder v. Gayle**, 142 F. Supp. 707, wherein the court said with reference to the right of one to decide with whom he wished to do business, "Indeed we think that such liberty is guaranteed by the due process of that (14th) Amendment."

Are not the petitioners now saying that the shoe has shifted to the other foot? Are they not saying that property owners have a choice of electing **to do business** with members of the Negro race, but that property owners have no right to elect **not to do business** with them? Petitioners' position on the subject is simply that if the property owners' election meets petitioners' approval, the election is valid under the Constitution; but if the election of the property owners meets with their disapproval, then it becomes an abuse of the Constitution.

Petitioners go further and say, in substance, that property owners cannot do some business with them and then

elect to refrain from doing other business with them. Your respondent urges that this entire matter is just that simple. Petitioners say deal with us all the way or not at all. Of course, petitioners may conduct their economic affairs in this fashion if they see fit to do so, and in fact are at the present time to a great extent doing exactly that in the respondent city. The Fourteenth Amendment requires that they have this liberty, but by the same token the business owner is entitled to the free exercise of the same choice, or any modification of same, he desires. To contend, as do petitioners, that his business is in a public place, can in no way take away his Constitutional guaranties, though it is not exactly clear to respondent what petitioners mean by the term "public place". Certainly it is not public property as petitioners have earlier asserted; at least the record nowhere reveals that the public purchased or paid for the property, or claims any right of control over it, **other than routine police powers and the exaction of taxes** through various forms.

Based upon **Browder v. Gayle**, supra, **Williams v. Howard Johnson**, supra, and freedom of the right to contract protected by the Fifth and Fourteenth Amendments to the Constitution, your respondent submits that the store owners could contract with petitioners on whatever basis was conductive to the culmination of an accord between the two of them.

Ground 7 of the motion to exclude the evidence (R. 8) says that defendant was a member of the public attempting to use "a **publicly owned facility** (emphasis supplied), to-wit: Pizitz * * *"; "that such denial was in accordance with a policy, custom and usage of **Pizitz** (emphasis supplied) of operating such facilities and services on a racially segregated basis, which policy, custom and usage violates the due process and equal protection clauses * * *"

Petitioners repeat in this ground of their motion to exclude the evidence, as they have done over and over, that their denial of Constitutional protection "**was in accordance with a policy, custom and usage of Pizitz**" (emphasis supplied), or such other store as might be involved in each of the respective cases here.

The Fourteenth Amendment bars **state action**, not "**Pizitz**" **action**, nor privately owned store action. It is, by the repeated assertion of counsel for petitioners in the state court, the **policy and custom of the stores** that have offended them. Under the state of the pleadings before the state court and the evidence adduced, plus the repeated admission of counsel for petitioners that it was Pizitz' custom or policy, or that of other stores, which denied petitioners their Constitutional rights, was there anything in the record before the state court which made it mandatory upon it to conclude that **state action** was the compelling force in the enforcement of the City's ordinance?

The sole reference to state action prior to completing the evidence in each of the cases, occurred in the **Gober** and **Davis** cases. Counsel for James Gober and James Albert Davis, in cross-examining an employee of Pizitz who had previously testified (R. 24) that Mr. Pizitz, in addressing the two defendants, had "used the term 'we cannot serve you here,'" asked the employee if he "assume(d) that he meant it was against the law." The employee answered, "I **assumed** (emphasis supplied) that" (ibid). Then counsel for defendants asked if the witness knew "of his own knowledge that there is such a regulation of the City of Birmingham." Whereupon, counsel for the City objected (ibid). The court inquired, "Would any witness' knowledge of the law be material?" (ibid). Counsel for the two defendants then informed the court that "our theory of this case (is) it is one based simply

on the segregation ordinance * * *" (ibid), and subsequently remarked that from the witness' answer, "It seems it is predicated on the segregation ordinance of the City of Birmingham rather than on the trespass" (R. 25). Then counsel for the two defendants addressed the court as follows: "If your honor pleases, may I say this. We are not arguing with the court. What I say (is) unless Mr. Pizitz had ordered these men out of the restaurant facilities they would not have been arrested and could not have been under the statute" (R. 25). At this point the record reads:

> "The Court: Is there any divergence between you and the City on that theory?
>
> Mr. Hall: I don't know, sir.
>
> The Court: Unless they failed to comply with some trespass, some trespass after warning. Isn't that what it is?
>
> Mr. Hall: I suppose so.
>
> The Court: Is that the issue. Is that the thing which is germane?
>
> Mr. Hall: It certainly is, your Honor" (R. 25, 26).

The trial court ruled again upon another question to the same witness regarding his being aware of a segregation ordinance, saying, "I don't believe the witness' knowledge of the law is competent"; and counsel withdrew the question (R. 26).

What provisions the ordinance contained was not put in the record; no effort was made on the part of counsel to identify the ordinance he had in mind; counsel for petitioners had not made an issue of the ordinance by any pleading; he did not seek to introduce a copy of the ordinance in evidence; he did not ask the court to take judicial notice of whatever ordinance he had in mind. The trial court would have been remiss had it permitted a witness

to testify as to whether he was familiar with some city ordinance or had knowledge on the subject.

20 Am. Jur., Sec. 799, supported by abundant citation of authority, states: "It may be laid down as a general rule that a witness is never permitted to give his opinion on a question of law or upon matters which involve a question of law. This rule is applicable to both expert and non-expert witnesses." See, also, **Alabama v. Adams, Rowe & Norman**, 216 Ala. 403, 113 So. 265; **Fionella v. City of Birmingham**, 35 Ala. App. 384, 48 So. 2d 764; **cert. den.**, 254 Ala. 515, 48 So. 2d 768, **cert. den.**, 340 U. S. 942.

Respondent submits that the effort of petitioners in the **Gober** and **Davis** cases to elicit information from an employee of a store concerning some unidentified ordinance, without reserving an exception to the trial court's sustaining objection to same, plus brief comment of counsel about a theory based upon same, falls considerably short of having properly made out a case of "state action" which deprived these two petitioners of their privileges under the Federal Constitution.

Ground 8 of the motion to exclude the evidence (R. 9) says in essence that if Pizitz and other like facilities were to cease doing business, its services "would have to be provided by the state", and therefore Pizitz may not segregate its store.

The only fault your respondent finds with this proposition is that Pizitz is presently providing its services and the state, as yet, is not. Until such time as the state takes over, the store is **privately owned** and **privately operated.**

D. State Court Did Not Commit Error in Overruling Motion for New Trial to the Denial of Petitioners' Constitutional Rights.

Similar motions for new trials were filed in each of the sit-down cases here involved. Their overruling by the

trial court was incorporated as ground 4 in the assignment of error filed in the Alabama Court of Appeals (see Gober case, R. 56).

The great majority of the grounds assigned had no relationship to Constitutional questions, and those that did have such relationship have already been discussed at some length.

As noted in the opinion of the state court of appeals (R. 61), "Assignments of Error Numbers 3 and 4, respectively, are to the effect that the lower court erred in overruling appellant's motion to exclude the evidence, and in overruling appellant's motion for a new trial. Counsel has made no attempt to separate these assignments for argument in brief, and we will treat them jointly, though we wish to observe that the grounds supporting the motion to exclude the evidence are faulty in several aspects, particularly in setting forth erroneous legal principles as their bases. All grounds specified in the motion were defective, and the court properly overruled the motion." The opinion made no further reference to the motion for new trial, but proceeded to discuss certain arguments made in appellant's brief which the court held to be erroneous (R. 61, 62, 63, 64).

The above mentioned statement of the state appellate court had obvious reference to **Rules of Practice in Supreme Court, Rule 9 (20), Alabama Code, 1940, Title 7, Appendix**, relating to the argument in brief of appellant, of each error assigned. The foregoing Supreme Court Rule has been construed many times. **American Surety Co. v. Hooker**, 36 Ala. App. 39, 58 So. 2d 462, and **Wyatt v. Birmingham**, 37 Ala. App. 579, 72 So. 2d 735, both assert: "Where assignments of error are argued in groups in appellant's brief, if any one of said assignments is without merit a review of the others will be pretermitted."

The net effect of this part of the appellate court's opinion is that since the motion to exclude the evidence was based upon "erroneous legal principles" (R. 61), the Court would, under its Rule 9 (10), not consider the motion for the new trial which was assigned as error number 4.

By the petitioners' election not to argue assignments of error number 3 and number 4 separately, petitioners based their hope of reversing the lower court upon the joint validity of both propositions assigned. The adverse finding of the appellate court as to error number 3 rendered unnecessary any consideration as to error number 4,[3] under authority of **American Surety Co. v. Hooker**, supra, and **Wyatt v. Birmingham**, supra.

III.

FOURTEENTH AMENDMENT NOT INVOLVED IN THIS CONTROVERSY.

Each of the sit down cases were tried under similar complaints, except for the names of the defendants and the respective stores involved (see **Gober**, R. 2, 3), which complaints charged that the defendant "did go or remain on the premises of another, said premises being the area used for eating, drinking, and dining purposes and located within the building commonly and customarily known as (name of store), located at (address), after being warned not to do so * * *".

Lengthy identical demurrers were filed (see **Gober**, R. 4, 5, 6), preceded by identical motions to strike (see **Gober**, R. 3, 4).

---

[3] Assignment of error number 5 was not argued at all in appellants' brief. See opinion of Alabama Court of Appeals (R. 64); court "pretermit(ed) consideration thereof", under authority of Supreme Court Rule 9 (10), (d).

None of the demurrers was sustained, as has been earlier noted. No ground of the demurrers properly charged any defect **apparent upon the face** of the complaint so as to afford plaintiff an occasion to **amend same** if need be. As noted by the Alabama Court of Appeals (R. 60), "it is clear that all of the grounds (of the demurrers) are general in nature, and in no wise point out any specific defect in the complaint".

The motion to strike was held inapplicable by the appellate court, with authority cited (R. 60).

The cases proceeded to trial on the question of whether or not the offense charged in the complaints had been committed by petitioners.

Petitioners in their brief before this Court now contend for the first time, that a segregation ordinance is involved in each case (p. 18); that a state segregation policy is involved (p. 23); that state enforcement of private racial discrimination is involved (p. 25). As noted herein earlier, after the completion of each of the trials below, the petitioners filed motions to exclude the evidence, contending in some half of their grounds that the **individual stores** practiced a usage and policy of segregation (R. 7, 8), and that because the stores were either publicly owned (see **Gober**, R. 8), or performing a public function (R. 9), the stores could not segregate their facilities. Before this Court their position changes from the theory that the stores are publicly owned, to that of being subjugated by state policy.

The respondent feels that it is not committed by the Court's rules to the task of defending all of the inconsistent positions of petitioners which were not properly placed in issue before the trial court.

As noted in the case of **Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO v. Mis-**

souri, 361 U. S. 363, "Constitutional questions will not be dealt with abstractly. * * * They will be dealt with only as they are **appropriately raised** (emphasis supplied) upon a record before us. * * * Nor will we assume in advance that a State will so construe its law as to bring it into conflict with the federal Constitution or an act of Congress."

For the purpose of correcting the record alone, your respondent notes that petitioners' brief (pp. 25, 26) contains the following: "But in every case, the City introduced evidence to prove that petitioners were asked by some employee of the store to leave the **dining area reserved for white customers** (emphasis supplied) (R. 21, 115, 162, 211, 252-253)." Your respondent has carefully reviewed each of the foregoing numbered pages of the Record and fails to find one mention of a "dining area reserved for white customers". The Court's review of same is invited. It will possibly be of some aid to the Court to note, however, that petitioners concede that in each case a store employee asked the defendants to leave the dining area.

Petitioners argue in their brief (pp. 44-47) that free speech is involved and make reference to the opinion of Mr. Justice Harlan, in **Garner,** supra, that sit-downs are a part of "free trade in ideas." Mr. Justice Harlan, in the foregoing opinion, affirmed also, "This is not to say, of course, that the Fourteenth Amendment reaches to demonstrations conducted on private property over the objection of the owner (as in Briscoe) just as it would not encompass verbal expression in a private home if the owner has not consented."

For one reason or another, it appears that if a **demonstration** is involved, the case for free speech becomes stronger. Whatever may be the significance of the word **demonstration,** the facts in these cases do not indicate to

your respondent that demonstrations were involved in these cases.

According to the record, certain things were common in each of the cases. None of the petitioners carried placards or handbills. None of the petitioners made or attempted to make speeches. No one resisted arrest in any manner so as to attract attention. None of the usual fanfare of photographers and newspaper people were in attendance as is customary for demonstrations. One of the petitioners (R. 21) suggested that the police be called; indicating that his extended presence on the premises was not of importance. One of the petitioners stated the nature of his business was to "shop", and that he purchased socks, toothpaste, and a handkerchief (R. 43). He stated further he was there for "a snack" (R. 49). Another of the petitioners (R. 170) stated he purchased comic books and paper. He further testified (*ibid*) that he said to Parker, "Let's go over here and get something to eat."

The only inference your respondent can fairly draw from the behavior of the petitioners in the stores is that their mission was to **provoke an arrest** and not to stage anything in the nature of a demonstration. The fact that only two students were involved in each store lends further credence to this conclusion. Under the facts as presented in the record, it would appear that the petitioners were accorded everything they sought in each of the stores, and that their right to **precipitate litigation** was in no way impeded nor denied them, but quite to the contrary. It must be assumed, and it is not denied, that the plans of the petitioners proceeded as they expected them to.

It is difficult for your respondent to see wherein the matter of free speech was in any way involved in the incidents which took place in the various stores. Assuming, however, that your respondent is in error in this regard, this Court's recent expression through Mr. Justice

Harlan, in **Garner**, supra, would deny petitioners Fourteenth Amendment protection while demonstrating on the private property of another after being told to leave.

CONCLUSION.

Wherefore, for the foregoing reasons, it is respectfully submitted that the conviction of the petitioners below should be affirmed.

Respectfully submitted,

WATTS E. DAVIS,

WILLIAM C. WALKER,

Earl McBee

EARL McBEE,

600 City Hall Building,
Birmingham, Alabama,
Attorneys for Respondent.

Supreme Court of the United States.

October Term, 1962.

James Gober et al., Petitioners,
vs.
City of Birmingham, Respondent.
No. 66.

Certificate of Service.

I, Earl McBee, one of the Attorneys for Respondent, City of Birmingham, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the

16th day of October, 1962, I served a copy of Brief for Respondent in the above-styled and numbered cause on Jack Greenberg and on Constance Baker Motley, Attorneys for Petitioners, by depositing same in a United States Post Office or mail box, with air-mail postage prepaid, addressed to them at their post office address, namely, 10 Columbus Circle, New York 19, New York, and on the following respective Attorneys of Record for Petitioners, whose addresses are known to Respondent, by depositing the same in a United States Post Office or mail box, with first-class postage prepaid, addressed to Arthur D. Shores, 1527 5th Avenue North, Birmingham, Alabama; Orzell Billingsley, Jr., 1630 4th Avenue North, Birmingham, Alabama; Peter A. Hall, Masonic Temple Building, Birmingham, Alabama; Oscar W. Adams, Jr., 1630 4th Avenue North, Birmingham, Alabama, and J. Richmond Pearson, 415 North 16th Street, Birmingham, Alabama.

Earl McBee

Earl McBee,
Attorney for Respondent.